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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1978

No. **78-893**

LEONARD PELTIER,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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Petitioner, Leonard Peltier, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming his conviction in the United States District Court for the District of North Dakota of two counts of first-degree murder, in violation of 18 U.S.C. §§ 1111 and 1114, ascribing criminal responsibility for the deaths of two FBI agents. The petitioner is incarcerated in the federal penitentiary at Marion, Illinois, having been sentenced to two consecutive life terms.



### OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing, not yet officially reported, is printed as Appendix A.

### JURISDICTION

The judgment of the court of appeals was entered on September 24, 1978. A timely petition for rehearing was denied on October 27, 1978. On November 17, 1978, Mr. Justice Blackmun granted a timely application for extension of time in which to file this petition to and including December 4, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

### QUESTIONS PRESENTED

1. May an extradition from a foreign country pursuant to an international treaty be based in part on affidavits acknowledged by the United States government to be false?

2. Is it a violation of an accused's rights to compulsory process and due process of law to exclude the competent, relevant testimony of a defense witness that government witnesses had intimidated and coerced her to sign false affidavits?

3. When a jury has heard evidence of government threats to witnesses, is an accused entitled to a jury instruction that the threats may be evidence of the weakness of the government's case?

4. Is it proper under Federal Rule of Evidence 404(b) to introduce into evidence lengthy and detailed accounts of other crimes and unrelated other weapons evidence going to collateral matters such as flight?

### STATEMENT OF THE CASE

On June 26, 1975, three people were killed by gunfire at Pine Ridge Indian Reservation in South Dakota: one American Indian, Joe Stuntz, and two FBI agents, Williams and Coler. The death of Joe Stuntz has not prompted any criminal charges. Four American Indian males were charged with murdering the two FBI agents: Jimmy Eagle, Dino Butler, Bob Robideau and Leonard Peltier. The government dismissed the charges against Jimmy Eagle. A jury acquitted Dino Butler and Bob Robideau in Cedar Rapids, Iowa. Leonard Peltier was extradited from Canada and tried separately.

The case against Leonard Peltier, as against Butler and Robideau, was entirely circumstantial. The government's theory throughout both trials was that Williams and Coler were present on the reservation in an attempt to locate and arrest Jimmy Eagle, and were "ambushed" by Peltier and others.

Leonard Peltier was on the reservation June 26; he fled. T. 1539-58.<sup>1</sup> He had come to Pine Ridge at the request of a board of tribal elders who knew his reputation as an organizer and leader, T. 3590, and he divided his time there between the compound of houses where the three deaths occurred and a nearby tent area set up in a traditional, religious fashion. T. 856-57, 3519-22.

Many of the residents in the tent area were members

<sup>1</sup> The defense was precluded from showing that Peltier was, with reason, afraid the FBI would kill him, and showing the climate of terror on the reservation. T. 3820, 3923. These facts would have shown that Peltier had reasons other than consciousness of guilt to leave.

of the American Indian Movement (AIM). Several witnesses testified that the occupants in the tent area feared an assault by Bureau of Indian Affairs officers and some of the more reactionary residents on the reservation, who had been known to harass and assault members of AIM. T. 401, 858, 1120, 1421, 1578. In fact, this climate of fear and oppression had prompted the elders to invite Peltier to the reservation. T. 3593-94. When Peltier fled, he sought refuge in Canada.

#### **The Extradition**

Peltier was indicted in the United States and arrested in Canada on February 7, 1976. The United States instituted extradition proceedings. The indictment was presented to the Canadian authorities along with an alleged eyewitness account of the murders. Two affidavits, said to have been signed by an Indian woman named Myrtle Poor Bear, were tendered by the United States to the Canadian government.<sup>2</sup>

The affidavits were dated February 23, 1976 and March 31, 1976, respectively. In them Poor Bear swore she saw Peltier shoot the two agents.

An extradition order was entered.

While Peltier was appealing the extradition order to the Minister of Justice of Canada, the Butler-Robideau trial for the same offense was underway at Cedar Rapids. Myrtle Poor Bear was on the government's witness list. In response to a discovery request, the government produced a Myrtle Poor Bear affidavit

<sup>2</sup> These two affidavits were reprinted in the Appendix as Affidavit 2 and Affidavit 3 at 45a-50a.

dated February 19, 1976, in which she swore she had left the reservation before June 26.<sup>3</sup>

Affidavit 1 was presented to the Minister of Justice of Canada as newly discovered evidence but the extradition was allowed to stand.

#### **The Trial: Evidence Of Government Misconduct**

There were no eyewitnesses to the killings. Only three government witnesses placed Peltier and others in the vicinity of the agents' car: Wish Draper, Michael Anderson and Norman Brown. T. 788, 1037-38, 1445-46. All three witnesses were young American Indians. They also said they had been threatened, intimidated, or physically abused by FBI agents during the investigation, including the government's principal witness Agent Adams. T. 841-44, 1097-100, 4802-06. Draper testified that he had been handcuffed and tied to a chair for three hours during an FBI interview. T. 1084. Defense witness Gene Day testified that the FBI agents threatened to take her children from her if she did not speak to them, and Norman Brown (recalled by the defense) stated that FBI threats had led him to testify falsely before the grand jury in this case. T. 3554, 4812.

In order to put the evidence of government misconduct which the jury was allowed to hear in proper perspective, the defense requested the following instruction, which the trial court refused to read:

"Testimony has been adduced in this case which

<sup>3</sup> This affidavit is reprinted in the Appendix as Affidavit 1 at 43a-45a.

if believed by you shows that the government induced witnesses to testify falsely. If you believe that the government, or any of its agents, induced any witnesses to testify falsely in this case [or in any related case], this is affirmative evidence of the weakness of the government's case."

#### **The Trial: The Myrtle Poor Bear Episode**

Myrtle Poor Bear was listed as a government witness in this case. Relying on this assurance, defense counsel was led to say in the opening statement that she was an "unbelievable" witness based on the three inconsistent affidavits.

During the government's case a shadow of doubt was cast over the Poor Bear affidavits by the testimony of four government witnesses that she had never been seen or heard of in the Jumping Bull Compound on the reservation where the three deaths took place, T. 849, 1118, 1597, 2701-03, and by the testimony of Dean Hughes, the chief investigator on the case, that he had no knowledge of when or how she became an informant. T. 2915-19.

The government elected not to call her. The defense then sought to call Myrtle Poor Bear in Peltier's defense to demonstrate that the government had resorted to fabrication of evidence, obstruction of justice, subornation of perjury and intimidation, all classic indicia of consciousness of a weak cause, and to lay bare the bias and hostility of two government witnesses, Woods and Price. The trial court entered a material witness order unopposed by the government.

Poor Bear was called by the defense, but the jury

never heard a word of her testimony. It was preserved for review in an offer of proof.<sup>4</sup>

She recanted virtually every allegation in the affidavits, swearing that FBI agents Woods and Price, two government witnesses at the trial, threatened to kill her if she would not inculcate Peltier. She swore that she had been taken to the Jumping Bull Compound to survey the area, previously unknown to her, prior to signing the affidavits. T. 4584-650. Also during the offer of proof, the defense sought to discover who prepared the affidavits. Agent Skelly said Woods and Price prepared the affidavits. T. 4501. Price said that he had interviewed Poor Bear but that the affidavits were prepared by a United States Attorney or the Canadian counsel representing the United States at the extradition. T. 4540.

During the oral argument before the eighth circuit, the United States Attorney admitted that the Poor Bear affidavits were false. An excerpt from the transcript of the hearing is reprinted as Appendix C to this petition at 53a-56a.

#### **Evidence Of Other Crimes, And Other Weapons**

Evidence of other crimes and weapons introduced by the government over strenuous and repeated objection permeate the entire record. In the interest of brevity, only a few are recited here:

1. A prior unrelated attempted murder charge in Milwaukee. T. 3417. Since the trial of this case,

<sup>4</sup>One of the U.S. Attorneys stated, during the offer of proof, why Myrtle Poor Bear had not been called as a government witness. He said, "There is no question that we had considered calling her as a witness. We did not for various reasons, including the garbage that is coming out now." T. 4601.



Peltier has been acquitted of that charge. The court of appeals expanded the record to include the acquittal pursuant to Peltier's F.R.App.P. 10(e) motion.

2. The explosion of an automobile in Wichita, Kansas, in which a large number of unrelated weapons and explosives were found. T. 1640-50, 2191-2216. Three firearms recovered at the scene were admitted along with several pictures of the explosion-damaged vehicle, several pictures of the eight or more firearms recovered from the vehicle, and several pictures of shells and hand grenades found at the scene. Testimony of the details of the items was heard by the jury. Peltier was not an occupant of the car and was not in the vicinity. T. 814-18, 1641-42, 2133-95.

3. Evidence of a burglary and truck theft at a home in Oregon (including fingerprint analysis), and a detailed account of an Oregon state trooper's alleged attempt to arrest Peltier at a motor home which was stopped on the highway. The trooper testified that Peltier fired a shot at him and fled. The government introduced photographs of fourteen firearms, eight of which had obliterated serial numbers, and several hand grenades which were found in the motor home. The government offered all of this evidence, which consumes several hundred pages of the transcript, T. 2217-2572, for the ostensible purpose of showing that Peltier was in flight. T. 2171-91.<sup>5</sup>

4. Peltier's possession of unrelated weapons at his arrest in Canada. T. 2746-92.

<sup>5</sup> Peltier was indicted in the County of Malheur, Oregon, for attempted murder and attempted use of a dangerous weapon for this incident. Soon after the charge was used against him in the trial below, the county court dismissed the charges. Peltier was never charged with the alleged burglary and truck theft in Oregon which was used against him in this case. Dennis Banks, Peltier, Anna Mae Aquash (who has since been killed) and others were

5. Testimony as to dynamite, hand grenades and unrelated weapons with obliterated serial numbers seized in the FBI's raid on the Rosebud Reservation 180 miles east of the Pine Ridge Reservation in September of 1975, at which Peltier was not present. T. 2573-600.

No cautionary or limiting instruction was given regarding any of this evidence until the end of the case. Instruction No. 40.

### REASONS FOR GRANTING THE WRIT

#### I. The Extradition was Based in Part on Fraud. This Court's Supervisory Power Should be Exercised to Enter an Order in Arrest of Judgment.

Renewed attention to the question of international rights by our own State Department and modern institutions such as the Human Rights Committee of the United Nations has quickened the academic and judicial debate over the conduct of states in extradition proceedings. This case asks the Court to examine and remedy as a matter of domestic law, a breach of the good faith which must be demanded in dealings among contemporary nations. The relief we are requesting here is not based solely on this Court's inherent power or the sound principles of international fair dealing

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charged in federal court in Oregon with several firearms and explosive possession charges after the vehicles stopped on the highway in Oregon were searched. The district court dismissed all of these charges and the ninth circuit affirmed the dismissals. *United States v. Loud Hawk*, (Nos. 76-1906, 76-2127) *slip op.* (July 26, 1977), *rehearing en banc granted pending remand* (9th Cir., March 6, 1978). Pursuant to Peltier's F.R.App.P. 10(e) motion in the court of appeals, the record in this case was expanded to include the dispositions of these charges.

established long ago, but a recognition that these recent developments are embodied in our Constitution.<sup>6</sup>

The Poor Bear affidavits were a significant portion of the evidence tendered to the Canadian authorities in the extradition proceedings. She was the only person who claimed to be an eyewitness to the killings. The United States government has now admitted that the affidavits were false in their entirety.

The treaty under which the extradition in this case took place was the Webster-Ashburton Treaty of 1842, as amended, 8 Stat. 572. The false affidavits were part of the "evidence of criminality" required by Article X of the treaty. This violation of the clear intent and meaning of an extradition treaty deprived the trial court of jurisdiction. In similar instances, this Court has directed entry of an order in arrest of judgment. *United States v. Rauscher*, 119 U.S. 407 (1886).

In *Rauscher* an order in arrest of judgment was entered because a defendant's presence was obtained by the misrepresentation that he was to be tried for murder, and he was then tried for a different offense. The government's conduct in this case was a far more egregious affront to international law and to the sovereignty of another nation consisting as it did of falsifying the "evidence" demanded by the treaty. Such misconduct must be redressed as a matter of domestic law. The government's action is "fraud upon the rights

<sup>6</sup> The Pine Ridge Reservation is land within the territorial jurisdiction of an independent nation of peoples, the Lakota Nation. For the purposes of this point, it must be noted that Leonard Peltier does not concede the jurisdiction of the United States to demand extradition from a foreign country for an alleged offense which occurred within the territorial jurisdiction of the Lakota Nation.

of the party extradited and . . . bad faith to the country which permitted his extradition." *Rauscher*, 119 U.S. at 422. "No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them." *Id.*

Of course, it has been held that a trial may proceed when the defendant's presence is secured by abduction, see, e.g., *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952). But this rule has been much criticized. E.g., M. Garcia-Mora, *Criminal Jurisdiction Of A State Over Fugitives Brought From A Foreign Country By Force Or Fraud: A Comparative Study*, 32 Ind.L.J. 428 (1957), and at least one court of appeals has disavowed it, *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

The consistent course of decision both here and abroad has, however, denied jurisdiction when custody is obtained in violation of a treaty. The principles of *Rauscher* have been applied not only where an American court has tried an accused for a crime other than the one for which extradition was granted, but also where there has been an action clearly contrary to the specific authorization of the treaty by the receiving nation that betrays the good faith necessary to relations between sovereigns.

In *Johnson v. Browne*, 205 U.S. 309 (1907), the defendant sought refuge in Canada. The United States had requested his extradition to serve a sentence for a crime which the Canadian government had said was not extraditable. The United States reindicted the defendant for an extraditable offense, obtained the extradition order, dismissed the charges and placed the de-



fendant in jail for the original sentence. The holding in *Rauscher* was applied. Likewise, in *Cosgrove v. Winney*, 174 U.S. 64 (1899), this Court held that the extradition process was abused when a defendant was arrested while out on bail, after extradition, for a crime which was an unextraditable offense.<sup>7</sup> The rule is clear: Blatant government misconduct in international proceedings cannot be countenanced.

**II. The Decision of the Court of Appeals Misreads Federal Rule of Evidence 403 as a Bar to a Defendant's Fifth Amendment Right to Due Process and Sixth Amendment Compulsory Process Right to Present Competent Relevant Evidence in His Behalf.**

The defense theory of the case was that the FBI had resorted to extraordinary, and sometimes illegal, means in proceeding against Peltier. The relevance of the Poor Bear testimony, and the purpose for which she was called as a defense witness, was that the government misconduct was evidence of government consciousness of a weak cause. When there has been attempted subornation, coercion of a witness, or spoliation of evidence, "... the inference, indeed, is one of the simplest in human experience . . .," and "the inference is an indefinite one, that the whole cause must be an unfounded one since such means are employed to sustain it." III, Wigmore, *Evidence* § 278 (Chadbourn rev. 1970). The misconduct goes directly to the government's knowledge of the merits of the entire case.

<sup>7</sup> When the court of appeals was presented with this issue, it did not apply the *Rauscher* principle, yet stated:

"The use of the affidavits of Myrtle Poor Bear in the extradition proceedings was, to say the least, a clear abuse of the investigative process by the FBI. This was conceded by government counsel on the hearing in this Court." Appendix 38a-39a n.18.

The Poor Bear testimony was also offered for a much simpler proposition which the court of appeals did not address. She testified that two prosecution witnesses had threatened, coerced and intimidated her to make false declarations. The rule here is well established. Witness bias and corruption in the form of hostility or attempts to suborn perjury is never collateral. It may be proven by extrinsic evidence and proof of either is admissible to contradict a witness' testimony or prove incredibility. III Wigmore, *Evidence* §§ 960 and 1005 at 805, 969 (Chadbourn rev. 1970). See, e.g., *United States v. Schennault*, 429 F.2d 852 (7th Cir. 1970) and *United States v. Haggett*, 438 F.2d 396 (2d Cir.), cert. denied, 402 U.S. 946 (1971).

Ordinarily trial court rulings under Rule 403 are entitled to great deference, but the trial court here didn't make one. It held that the testimony was irrelevant. T. 4665.

The court of appeals, first stating that this proffer was "certainly consistent" with the defense theory of the case and that "the more prudent course might have been to allow the defense to present the evidence," held that the evidence was properly excluded under Federal Rule of Evidence 403.<sup>8</sup>

In a variety of contexts this Court has held that rules of evidence cannot be applied to restrict a defendant from obtaining and introducing evidence. In *Washington v. Texas*, 388 U.S. 14 (1967), this Court invalidated a state rule of evidence which prohibited an

<sup>8</sup> Federal Rule of Evidence 403 reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

entire class of potential defense witnesses from testifying on a defendant's behalf. The state rule of evidence could not suspend the fifth and sixth amendments. The court of appeals appears to read Rule 403 broadly as a similar partial revocation of a defendant's constitutional right to compulsory process and due process of law.

As *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), which overturned the exclusion of a third party's confession as hearsay, makes clear, the constitutional right of a defendant "to present witnesses in [his] own defense" is not to be yielded up to unduly restrictive evidentiary practice.

Once it was acknowledged that the testimony was "certainly consistent" with the defense theory of the case, and therefore relevant, Rule 403 permitted discretion only after a finding that probative value was *substantially* outweighed by the listed considerations. The trial court made no such finding. The court of appeals required a mere "weighing," ignoring the burden explicit in Rule 403. The scales are not even; "substantially" is not surplusage. *It is this very point that conforms Rule 403 with the fifth and sixth amendments.*

As one commentator has pointed out, *Chambers* implies that when a defendant presents competent, relevant evidence the burden shifts to the state to "demonstrate that it is so inherently unreliable as to leave the trier of fact no rational basis for evaluating its truth." P. Westen, *Compulsory Process*, 73 Mich. L. Rev. 71, 152 (1974). See generally P. Westen, *Compulsory Process II*, 74 Mich. L. Rev. 191 (1975).

The misapplication of Rule 403 implicates basic

constitutional values. Indeed, it denies the very purpose for which the compulsory process clause was included in the bill of rights, implicitly recognized by Chief Justice Marshall, sitting on circuit, in *United States v. Burr*, 25 F. Cas. 30 (No. 24692d) (C.C.D. Va. 1807),<sup>9</sup> to allow an accused to explore and present to the jury the other side of the government's case.

### III. Other Circuits have held that Evidence of Spoliation, Witness Coercion and Subornation of Perjury is Admissible to Prove Consciousness of a Weak Cause.

*Chambers* teaches, at the least, that evidence admissible against an accused is admissible in his favor, as noted by Professor Westen in *Compulsory Process*, 73 Mich. L. Rev. at 155. Had Leonard Peltier threatened Poor Bear with harm if she did not testify falsely in his favor, the government doubtless could have called her as a witness to testify as to those events. If the court of appeals is understood to find such evidence generally inadmissible, it is not in agreement, as shown below, with other circuits that have considered the question. The only other explication of its holding is that such evidence may only be proffered by one party in a criminal case.

In *United States v. Honore*, 450 F.2d 31 (9th Cir. 1971), *cert. denied*, 404 U.S. 1048 (1972), evidence of a defendant's attempts to intimidate a witness was held properly admitted as demonstrating consciousness of guilt. Likewise, in *United States v. Turner*, 485 F.2d 976 (D.C. Cir. 1973), evidence of an attempted bribery of a witness by the defendant was held admissible.

<sup>9</sup> See also *United States v. Burr*, 25 F. Cas. 187 (No. 14694) (C.C.D. Va. 1807). For an analysis of Marshall's treatment of compulsory process, see *Compulsory Process*, 73 Mich. L. Rev. at 101-08.

*United States v. Palmieri*, 456 F.2d 9 (2d Cir.), cert. denied sub nom., *Wisniewski v. United States*, 406 U.S. 945 (1972), is similar to this case. During the trial of that case, the defendant asked "A" to coerce or bribe "X" and "Y", the victims and principal witnesses in the extortion offense being tried. "A" was unsuccessful and confessed his attempt to the United States Attorney's office. He testified the next day as to the statements and conduct of the defendant when he asked "A" to coerce "X" and "Y". The evidence was admitted solely as to the defendant's consciousness of a weak cause, and held to be proper given a limiting instruction.

This Court recognized as early as *Allen v. United States*, 164 U.S. 492, 500 (1896), "that the fabrication of testimony raises a presumption against the party guilty of such practice." The rule fashioned by the court of appeals carves out an exception for the government when it is a party in a lawsuit.

**IV. Other Circuits have held that a Defendant is Entitled to a Jury Instruction that Government Threats to Witnesses May be Regarded as Evidence of the Weakness of the Government's Case.**

Although the trial court prevented the jury from hearing the Poor Bear testimony, there was evidence that the government threatened and intimidated Brown, Draper, Anderson and Day and that the threats induced Brown to testify falsely before the grand jury. The defense sought to put this evidence in perspective and requested the jury instruction set out above. The courts below held that Peltier was not entitled to the instruction.

In *United States v. Vole*, 435 F.2d 774 (7th Cir.

1970), the precise jury instruction which was requested here was held properly given, but the court reversed because a broader theory of the case instruction was refused. It has been held that a defendant is entitled to an instruction on his or her theory of the case, "even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility." *Tatum v. United States*, 190 F.2d 612, 617 (D.C. Cir. 1951). Accord, *United States v. Alfonso-Perez*, 535 F.2d 1362, 1365 (2d Cir. 1976) and *United States v. Partin*, 493 F.2d 750, 761-62 (5th Cir. 1974).

Here, the impeaching testimony of the principal government witnesses was effectively precluded from the jury's consideration by the trial court's refusal to instruct.

**V. The Court of Appeals has Vitiating the Control of the Admission of Other Crimes Evidence to be found in Federal Rule of Evidence 404(b) and Required by Other Circuits.**

Since the adoption of the Federal Rules of Evidence in 1975, no rule has engendered such contrariety of judicial expression as 404(b).<sup>10</sup> Some differences arise from the peculiar facts of the many cases reviewed; an attempt to reconcile and eliminate these variances in the details of application would be exhausting and likely futile. Differences that go to the limits of the rule, such as to scope (e.g., whether other crimes evidence must go to a material issue in the case; whether

<sup>10</sup> Rule 404(b) provides:

Other Crimes, Wrongs, Or Acts.

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.



the list of permitted purposes to be found in the rule is "inclusory" or exhaustive) are of another order entirely. Not only are such differences capable of resolution, but the varying views expressed in the array of appellate opinions offer no consistent guide to the conscientious trial judge on an issue of importance and frequent occurrence.

Here, substantial evidence was admitted of "other crimes" (burglary of a home, theft, and alleged attempted murder of a police officer) in connection with an incident in Oregon. The incident occurred four months after the offense being tried, was proved with scrupulous attention to detail, and was offered for the ostensible purpose of demonstrating that Peltier was in flight a few months after the crimes charged and thus conscious of his guilt.<sup>11</sup>

Admission of this evidence expands the "exception" in Rule 404(b) so broadly as to negate the rule itself. Proof of "flight" is not such a listed purpose. The second circuit has stressed the view that the listed purposes are not exhaustive, but "inclusory," *United States v. Williams*, 577 F.2d 188, 192 (2d Cir. 1978) or "inclusionary," *United States v. Benedetto*, 571 F.2d 1246, 1248 (2d Cir. 1978). A view shared by the third, e.g., *United States v. Long*, 574 F.2d 761, 766 (3d Cir. 1978), and ninth, e.g., *United States v. Hearst*, 563 F.2d 1331, 1336 n.3 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978), circuits. The fifth circuit has taken a different and narrower view, e.g., *United States v.*

<sup>11</sup> There were several other instances where the government was allowed to prove other crimes in addition to the one here used to illustrate the issue, e.g., that Peltier was facing charges of attempted murder in Wisconsin. (He was acquitted subsequent to the trial at issue, see opinion below n.6.)

*Myers*, 550 F.2d 1036, 1044 (5th Cir. 1977).<sup>12</sup> The eighth circuit has variously adopted both readings.<sup>13</sup>

<sup>12</sup> "Because the risk of prejudice is so great, we have held that there are two conditions that must be satisfied before evidence of other crimes may be admitted. First, the threshold prerequisites to admission must be met. There prerequisites are:

- (1) Proof of the other similar crimes must be plain, clear and convincing.
- (2) The other crimes must not be too remote in time from the charged offense.
- (3) The evidence of the other crimes must be introduced for a purpose sanctioned by Rule 404(b) of the Federal Rules of Evidence.
- (4) The element of the charged offense that the evidence of other crimes is introduced to prove must be a material issue in the case.
- (5) There must be a substantial need for the probative value of the evidence of the other crimes.

See *United States v. Taglione*, 546 F.2d 194, 199 (5th Cir. 1977); *United States v. Bloom*, 538 F.2d 704, 708 (5th Cir. 1976); *United States v. San Martin*, 505 F.2d at 921-22; *United States v. Broadway*, 477 F.2d at 994-95. Second, the probative value of the evidence of other crimes must outweigh the prejudice to the defendant that may result from its admission. Fed.R.Evid. 403;"

<sup>13</sup> The eighth circuit has two contradictory lines of "other crimes" authority, with virtually no cross-citation between them. A "test" was established in *United States v. Clemons*, 503 F.2d 486, 489 (8th Cir. 1974), echoing the fifth circuit. Compare, e.g., *United States v. Weir*, 575 F.2d 668 (8th Cir. 1978) (reversing a conviction where threats to assassinate an informant were admitted in violation of Fed.R.Evid. 403; *Clemons* not cited), and *United States v. Jones*, 570 F.2d 765 (8th Cir. 1978) (reversing the conviction of a physician for distribution of narcotics by prescription when other similar narcotic prescriptions were admitted; *Clemons* cited), with, e.g., *United States v. Bohr* (No. 78-1096) slip op. (8th Cir. July 12, 1978) (affirming conviction for wire fraud where similar criminal act was relevant to identify under 404(b); *Clemons* cited), and *United States v. Adcock*, 558 F.2d 397 (8th Cir. 1977) (affirming Hobbs Act conviction where similar criminal acts established "intent"; *Clemons* not cited).

No matter what view is taken as to the inclusory or exhaustive nature of the list of permitted purposes, this case poses the prior question of whether materiality is a necessary prerequisite to any evidence of other crimes.

This Court has repeatedly held that evidence of flight is to be received, if at all, with great caution. "[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963), citing, e.g., *Alberty v. United States*, 162 U.S. 499 (1896) and *Hickory v. United States*, 160 U.S. 408 (1895). When the government chooses "other crimes" evidence—which is itself a suspect mode of proof—as a means of showing flight, the possibility of prejudice is multiplied and the probative value correspondingly weakened. The series of inferences that must be drawn from flight before a material issue in a criminal trial can even be approached has recently been outlined by the fifth circuit: "(1) from the defendants behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged." *Myers*, 550 F.2d at 1049.

The conflict between *Myers* and this case is only one example of the differing approaches of the courts of appeals on this issue. Some differences go simply to details of application of Rule 404(b); here, there is a conflict as to the *limits* of the rule. The burgeoning body of inconsistent court of appeals opinions indicates that the administration of justice now requires this Court's consideration of the boundaries of the rule.

# VI. The Decision Below Conflicts with the Decision of Other Courts of Appeals as to the Admissibility of Other Weapons Evidence.

Evidence of numerous weapons, unrelated to the crime charged and unconnected to Peltier, were introduced by the government over strenuous objection.<sup>14</sup> The court of appeals held that the weapons were properly admitted, in conflict with the view of other circuits.

Only recently, the tenth circuit unanimously reversed the convictions of five defendants convicted of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951 and possession of unregistered incendiary bombs, 26 U.S.C. § 5861(d), based upon the improper admission of *one* rifle against *one* of the codefendants. *United States v. Warledo*, 557 F.2d 721 (10th Cir. 1977). *Accord*, *United States v. Reid*, 410 F.2d 1223 (7th Cir. 1969); *Thomas v. United States*, 376 F.2d 564 (5th Cir. 1967); and *Moody v. United States*, 376 F.2d 525 (9th Cir. 1967). *Cf.*, *United States v. Robinson*, 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied*, 435 U.S. 905 (1978) (introduction of evidence of gun in possession

<sup>14</sup> The court of appeals amended its opinion upon denial of rehearing by adding a paragraph which stated that the admission of other weapons and other crimes evidence was harmless error because Peltier's trial counsel didn't object to most of it. See Appendix at 23a. This seems to ignore the pretrial record in the district court where a lengthy and broad motion *in limine* was filed, to exclude the evidence of other crimes and weapons which the defense anticipated the government would seek to introduce based on the way the trial was conducted in Cedar Rapids. The motion *in limine* was denied. Moreover, even a quick perusal of the record makes clear that one of the central topics of discussion between bench and bar was the admissibility of the other crimes and other weapons evidence. Specific objections were raised constantly. A few examples can be found at T. 152-6, 169-73, 814-18, 1692-732, 2133-44, 2148, 2172-91, 2195, 2434.



of defendant at time of arrest offered to prove identity, held not prejudicial under Federal Rule of Evidence 403).

#### CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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Dated: December 4, 1978

## APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 77-1487

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UNITED STATES OF AMERICA, *Appellee*,

v.

LEONARD PELTIER, *Appellant*.

**Appeal from the United States District Court  
for the District of North Dakota**

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Submitted: April 12, 1978

Filed: September 14, 1978

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Before GIBSON, *Chief Judge*, ROSS and STEPHENSON,  
*Circuit Judges*.\*

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Ross, *Circuit Judge*.

On June 26, 1975, two Special Agents of the Federal Bureau of Investigation, Jack Coler and Ronald Williams, were murdered on the Pine Ridge Indian Reservation in South Dakota. Leonard Peltier, Robert Eugene Robideau, Darrell Dean Butler, and James Theodore Eagle were charged with the murders in a two-count indictment for first-degree murder in violation of 18 U.S.C. §§ 2, 1111, and

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\* This appeal was originally submitted to a panel of Judges Ross, Stephenson and Webster. Upon Judge Webster's resignation from the court, the appeal was resubmitted to Chief Judge Gibson, and Judges Ross and Stephenson.

1114. Robideau and Butler were jointly tried by a jury and were acquitted. The government dismissed the charges against Eagle. Subsequent to the Robideau-Butler trial, Peltier was tried by a jury, was convicted on both counts, and was sentenced to life imprisonment on each count, the sentences to run consecutively. He appeals.

Peltier was not a permanent resident of the Pine Ridge Reservation. His presence there in June of 1975 was the result of a political struggle between certain reservation members who supported the structure of tribal government, and supporters of the American Indian Movement (AIM) who advocated a different form of government. In an effort to alleviate the conflict, tribal elders had invited members of AIM to stay at the reservation. Leonard Peltier, Darrell Butler, Robert Robideau, Michael Anderson, Wilford Draper, Norman Charles, Norman Brown, and Joe Stuntz, all AIM members, accepted their invitation. They arrived in the spring of 1975 and stayed in an encampment on the reservation which became known as "Tent City."

In June of 1975, Special Agents Coler and Williams were engaged in felony criminal investigations on the Pine Ridge Indian Reservation. On June 25 and 26, they were attempting to locate and arrest four individuals, including James Theodore Eagle, who were charged with armed robbery and assault with a deadly weapon.

Shortly before noon on June 26, Special Agent Williams, driving a 1972 Rambler, and Special Agent Coler, driving a 1972 Chevrolet, entered the Harry Jumping Bull Compound on the reservation.<sup>1</sup> The agents were following three individuals riding in a red and white van that had entered the

<sup>1</sup> The compound consists of a number of houses and buildings, and is located a short distance off Highway 18 between Oglala and Pine Ridge, South Dakota. It is approximately a quarter of a mile northwest of Tent City.

compound shortly before them.<sup>2</sup> The van stopped at a fork in the road leading to Tent City. The agents stopped at the bottom of a hill. Williams advised Coler on the radio that the occupants of the van were about to fire on them. Firing commenced. Other AIM members who were present at the Jumping Bull Compound or Tent City thereafter joined in the shooting.

The agents took heavy fire. Over 125 bullet holes were found in their cars. In contrast, only five shell casings attributable to the agents' guns were ever found at the scene. Both agents were wounded by bullets fired from a distance. Special Agent Coler was wounded by a bullet that traveled through the trunk lid of his car and struck his right arm. The force of the bullet almost took his arm off, rendering him completely disabled and causing him to lose blood rapidly. He crawled to the left side of his car, away from the gunfire. Williams was shot in the left shoulder. The bullet traveled from his shoulder, under his arm and into his side. Although wounded, Williams removed his shirt and attempted to make a tourniquet for Coler's arm. Williams at some point was also shot in the right foot.

These wounds were not fatal. The agents were killed with a high velocity, small caliber weapon fired at point blank range. Williams attempted to shield his face from the blast with his right hand, turning his head slightly to the right. The murderer placed the barrel of his gun against Williams' hand, and fired. The bullet ripped through Williams' hand, into his face, and carried away the back of his head. He was killed instantly. The murderer shot Coler, who was unconscious, across the top of the head. The bullet carried away a part of his forehead at the hairline. The shot was not fatal, however. The murderer then lowered his rifle a

<sup>2</sup> The agents had been told that Eagle might be riding in a red vehicle.

few inches and shot Coler through the jaw. The shell exploded inside his head, killing him instantly.

The evidence against Peltier was primarily circumstantial. Viewed in the light most favorable to the government,<sup>3</sup> the strongest evidence that Peltier committed or aided and abetted the murders is as follows:

1. The van that the agents followed into the Jumping Bull Compound was occupied by Peltier, Norman Charles and Joseph Stuntz.

2. At the time, Peltier had access to information that he was being followed by FBI agents. One of the occupants of the van, Norman Charles, had been picked up along with two other AIM members, Anderson and Draper, by Coler and Williams the day before. The three had been transported to Pine Ridge in Williams' car, and were later released after the agents were informed that none of them was Jimmy Eagle.

3. Peltier had reason to believe that the agents were looking for him, rather than Jimmy Eagle. He stipulated at trial that there was an arrest warrant outstanding, charging him with attempted murder. Upon his arrest in Canada months later for the murders of the agents, Peltier remarked that the two agents were shot when they came to arrest him. He also made other incriminating statements.

<sup>3</sup> "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Hamling v. United States*, 418 U.S. 87, 124 (1974), quoting *Glasser v. United States*, 315 U.S. 60, 80 (1942). As we pointed out in *United States v. Lambros*, 564 F.2d 26, 28 (8th Cir.), cert. denied, 430 U.S. 930 (1977), the same standard of review applies in cases where the conviction rests on circumstantial evidence, because circumstantial evidence is equally as probative of guilt as direct evidence.

4. Michael Anderson, one of the AIM members who was firing at the cars from one of the houses in the Jumping Bull Compound, testified that after both sides had been shooting at one another from a distance, and at least one of the agents had been wounded, he saw Peltier, Robideau and Butler standing down at the agents' cars. Peltier at the time was holding an AR-15. Shortly after he saw the three down at the agents' cars, he began to walk back to Tent City, a distance of about a quarter of a mile. When he arrived at Tent City, Peltier, Robideau and Butler were already there, as was Williams' car. F.B.I. agents who later searched the area recovered Williams' badge and billfold on the ground near the junction of the roads leading to the houses and Tent City. It was at this junction that Peltier's van had stopped shortly before the firing commenced.

5. According to the doctor who performed the autopsies, the agents were shot with a high velocity, small caliber weapon. Peltier's AR-15, the civilian counterpart of the M-16, was the highest velocity weapon fired that day.<sup>4</sup> No other person was seen by any trial witness on June 26 with an AR-15. Peltier carried his AR-15 out with him when he and the other participants of the shoot-out escaped from the reservation and fled to the Rosebud Reservation, where they remained for some time before splitting up. Robideau, Charles and Anderson went south after leaving Rosebud. Anderson testi-

<sup>4</sup> When seen standing at the cars, Peltier carried an AR-15 and Butler an M-1. Robideau had been seen on various occasions carrying a Commando Mark III, a .45 caliber semiautomatic weapon. The velocity of a commercially loaded .223 caliber cartridge fired from an AR-15 is 3200 feet/second, a .30/06 caliber cartridge fired from an M-1, 2700 feet/second, and a .45 caliber cartridge fired from a Commando Mark III over 1000 feet/second.



fied that he loaded their car with weapons, one of which was an AR-15, before they left South Dakota. On September 10, 1975, the car exploded on the Kansas Turnpike, and police recovered from the car the AR-15 which the government contended Peltier used on the day of the murders.

6. Ammunition components linked ballistically to the same AR-15 were found at the crime scene. The ballistics expert was unable to fire the AR-15 because it had been damaged in the explosion on the Kansas Turnpike. However, he was able to remove the bolt from it, place the bolt in another AR-15, and test fire the replacement AR-15. The expert testified that a .223 cartridge casing found in the trunk of Coler's car had been loaded into and extracted from the AR-15. He also testified that a .22 caliber copper bullet jacket found in the ground underneath the bodies of Coler and Williams had rifling impressions consistent with the rifling of the barrel of an AR-15. There was no testimony to indicate that either Robideau or Butler was seen the afternoon of the murders with a weapon that fired .22 caliber bullets.

7. Wilford Draper, a member of the escape party that left Tent City the evening of the murders, testified that he overheard Peltier, Butler and Robideau discussing certain details of the murders on the evening of June 26, 1975.

8. Peltier was stopped by police months later in the State of Oregon. He fled the scene, turning to fire on one of the police officers. The motor home in which he was riding was searched, and Special Agent Coler's revolver was found in a bag bearing Peltier's thumbprint.

After a twenty-five day trial, Peltier was convicted by

a jury of both counts of first-degree murder. He alleges on appeal<sup>5</sup> that:

1. Certain evidence introduced at trial was so prejudicial and inflammatory that its admission constituted a denial of due process;

2. The trial court refused to instruct the jury on his defense that he was a victim of an F.B.I. frame-up, and refused to allow him to introduce much of the available evidence of F.B.I. misconduct, thereby depriving him of a fair trial and of his right to compulsory process;

3. The trial court's refusal to reread testimony requested by the jury constituted an abuse of discretion;

4. The trial court had no jurisdiction to try him because the United States Government deliberately violated the Webster-Ashburton Treaty;

5. Prosecution is barred by the doctrine of collateral estoppel.

<sup>5</sup> The appellate attorneys also seem to be raising a question of the competency of trial counsel. Peltier was initially represented on appeal by his trial attorneys, who filed a brief on his behalf. On November 2, 1977, this court permitted new counsel to enter the case. Peltier's second set of attorneys, in oral argument, argued that Peltier's trial attorneys should have called F.B.I. Director Clarence Kelley as a witness for the defense, and that their failure to do so was prejudicial to Peltier. We have carefully examined the record in the trial court and on appeal, and have concluded that the defendant's trial counsel were aggressive, capable, and informed, and engaged in sophisticated trial decisions on strategy. Their decision not to call Clarence Kelley, who did testify in the Butler-Robideau trial, was clearly such a tactical decision. We have read the transcript of Kelley's testimony at the Butler-Robideau trial, and find that its relevance to Peltier's trial was highly doubtful. The allegations of Peltier's counsel on appeal amounts to no more than hindsight and second-guessing by one lawyer concerning trial tactics used by another lawyer. Peltier was equally well-represented at trial and on appeal.



We affirm.

# I

## *Admission of Flight, Other Crimes, and Weapons Evidence*

In proving its case against Peltier, the government was required to introduce a great deal of evidence regarding the firearms used by the participants of the shoot-out. This evidence included the firearms in the possession of the dead agents and the AIM members on June 26, the firearms recovered upon a search of Tent City shortly after the murders, and the various ammunition components recovered upon a search of the entire crime scene shortly after the murders. Since the case against Peltier was circumstantial, the evidence was necessary to negate the participation in the actual murders by others who were admittedly present.

In the course of introducing the admittedly relevant firearms evidence, the government offered evidence which the defendant describes as inadmissible other crimes and weapons evidence. Most of this evidence related to the circumstances surrounding the discovery of the admittedly relevant firearms evidence described above. Defendant complains of the admission of this evidence, even though much of it was admitted without objection.

### A. OTHER CRIMES EVIDENCE

The admissibility of other crimes evidence is governed by FED. R. EVID. 404(b), which provides:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have held that evidence of other crimes, wrongs, or acts that is vague and speculative is not admissible under Rule 404(b). *United States v. Jones*, 570 F.2d 765, 768 (8th Cir. 1978); *United States v. Maestas*, 554 F.2d 834 n.2 (8th Cir.), *cert. denied*, 431 U.S. 972 (1977). Furthermore, an issue on which other crimes evidence is admissible must be raised at trial. *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Maestas*, *supra*, 554 F.2d at 837; *United States v. Clemmons*, 503 F.2d 486, 489 (8th Cir. 1974).

Evidence that is admissible under the terms of Rule 404(b) may nevertheless be excluded under the provisions of FED. R. EVID. 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In reviewing a discretionary decision to admit evidence under Rule 403, we give great deference to the trial judge who saw and heard the evidence. *United States v. Bohr*, No. 78-1096, slip op. at 6 (8th Cir. July 26, 1978); *United States v. Weir*, 575 F.2d 668, 670 (8th Cir. 1978); *United States v. Matlock*, 558 F.2d 1328, 1332 (8th Cir.), *cert. denied*, 434 U.S. 872 (1977); *United States v. Maestas*, *supra*, 554 F.2d at 836.

We will discuss each claim of erroneously admitted evidence separately.

### 1. *Milwaukee, Wisconsin Incident*

At the trial, the parties stipulated to the following facts: On November 22, 1972, Peltier was charged with attempted murder in Milwaukee, Wisconsin. He was arrested, pleaded

not guilty, and was released on bond. On July 29, 1974, he failed to appear for trial on the charge, his bond was forfeited, and a bench warrant was issued for his arrest. Peltier was aware of the outstanding arrest warrant for attempted murder and knew that if he were taken into custody by law enforcement officials, he would be returned to Milwaukee to stand trial.

The defendant agreed to stipulate to these facts only after the district court rejected his argument that they were not relevant. The government argues that this evidence was admissible under Rule 404(b) to prove motive, because it tended to show why Peltier reacted with deadly force when followed by the F.B.I. agents. We agree. The key issue at trial was the identity of the murderer, and evidence tending to show motive was clearly relevant. *United States v. Stover*, 565 F.2d 1010, 1013 (8th Cir. 1977); *Gregory v. United States*, 365 F.2d 203, 205 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, as is contended by Peltier on appeal. The evidence was highly probative, especially when considered in conjunction with a statement Peltier made after his arrest in Canada to the effect that the two agents were shot when they came to serve him with the Wisconsin warrant. Furthermore, the government took steps to minimize the danger of unfair prejudice. The fact that the person Peltier allegedly assaulted in Wisconsin was an off-duty police officer was withheld from the jury. The stipulation was read to the jury at the end of the government's case. Finally, the following cautionary instruction was given:

Evidence has been admitted relating to other crimes, wrongs or actions alleged to have been committed by the defendant in this case. Such evidence is not to be

considered to prove the character of the defendant in order to show that he acted in conformity therewith on June 26, 1975.

Evidence of a charge against the defendant in Wisconsin and his alleged flight to avoid trial was introduced to show a possible motive the defendant may have had to avoid apprehension on June 26, 1975. The defendant is presumed to be innocent of the Wisconsin charge and the evidence relating to that charge must be considered by the jury only on the issue of motive.

We hold that the district court did not abuse its discretion in admitting this evidence.<sup>6</sup>

## 2. Ontario, Oregon

On November 14, 1975, Oregon State Police stopped two vehicles near Ontario, Oregon: a motor home and a Plymouth station wagon. Peltier was one of the occupants of the motor home, and fled the scene, turning to fire at the state trooper. Upon searching both vehicles, Oregon authorities recovered from the motor home Special Agent Coler's revolver in a paper bag bearing Peltier's fingerprint, and from the station wagon several shell casings that had been fired from Coler's revolver.

The defendant alleges error in the admission of much of the "other crimes" evidence offered by the government relating to the Oregon incident.

<sup>6</sup> Subsequent to the trial in the instant case, Peltier was tried and acquitted of the charge of attempted murder of a police officer in Milwaukee, Wisconsin. He now argues that his acquittal dramatically illustrates the lack of probative value of the evidence. We disagree. The evidence is probative of Peltier's state of mind on the day of the murders. That state of mind was not affected by the disposition of the charge subsequent to the murders. Furthermore, the cautionary instruction adequately cured any unfair prejudice which could have arisen from the jury's knowledge of the pending assault charge.

### a. Evidence of flight

In addition to the testimony that Peltier fled the scene, turning to fire at the arresting officer, the government introduced testimony that the following items were recovered upon a search of the vehicle:

- i. fourteen firearms, eight of which had obliterated serial numbers, and numerous boxes of shells;
- ii. tool boxes containing wiring, pocket watches with wires leading out of them, tools, pliers, and empty shell casings;
- iii. pieces of paper in each vehicle upon which were written code numbers and words as follows: #510—bomb; #54—pigs; #527—ammo; #529—cops; #528—dynamite; #524—roadblock. Both vehicles were equipped with CB radios, and the motor home was equipped with a scanner to pick up other frequencies;
- iv. nine hand grenades.

In addition to the testimony, pictures of most of the items described in (i), (ii), and (iv) were also admitted into evidence.

The defendant objected to the admissibility of much of this evidence; the government contends that it was properly admitted as evidence of flight. It is well settled that flight of the accused subsequent to the commission of a crime is, in certain instances, "a circumstance proper to be laid before the jury as having a tendency to prove his guilt." *Allen v. United States*, 164 U.S. 492, 499 (1896). *Accord*, *United States v. White*, 488 F.2d 660, 662 (8th Cir. 1973), and cases cited therein. However, in the face of Supreme Court decisions expressing doubt as to the probative value of flight, see *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963); *Alberty v. United States*, 162 U.S. 499, 511 (1896); *Hickory v. United States*, 160 U.S. 408, 418 (1896),

the lower courts have generally scrutinized the facts of each case to determine whether the jury should be given the opportunity to draw an inference of guilt from a defendant's flight.

The probative value of flight evidence has recently been analyzed in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977). There the court held that the probative value of flight as circumstantial evidence of guilt

depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged.

The validity of drawing these inferences in turn depends upon the number of evidentiary manifestations suggesting defendant's decision to flee was prompted by considerations related to the crime in question. As the court stated in *Bailey v. United States*, 416 F.2d 1110, 1115 (D.C. Cir. 1969), "guilt, as a factual deduction, must be predicated upon a firmer foundation than a combination of unelucidated presence and unelucidated flight."

We hold that there was a sufficient number of such evidentiary manifestations to make evidence of flight and of resistance to arrest<sup>7</sup> highly probative of consciousness of guilt, and hence guilt itself in this instance. First, Peltier fled the scene of the crime immediately after its commission. His actions in Oregon were a continuation of that immediate flight. Second, the fact that the motor home and station

<sup>7</sup> Evidence that the defendant resisted arrest is similarly admissible as showing consciousness of guilt. *United States v. Graham*, 548 F.2d 1302, 1313 n.13 (8th Cir. 1977).



wagon were traveling arsenals linked by communication devices and code words designed for avoidance of arrest was significant evidence of Peltier's state of mind. Finally, and most important, evidence linking Peltier to the murders was discovered upon a search of the vehicle from which he fled. The presence in the motor home of Agent Coler's revolver, in a bag having Peltier's fingerprint on it, was one of the key pieces of evidence against Peltier. Under these circumstances, we find that the evidence of flight was highly probative.

Peltier argues that the evidence of flight was inadmissible because it did not relate to flight occurring immediately after the murders, and because the government did not show that at the time of the flight in Oregon, the defendant had been charged with, or knew he was being sought for, the murder of the two agents.<sup>8</sup> In support of his argument, he cites *United States v. White, supra*, 488 F.2d 660, and *United States v. Jackson*, No. 77-1796 (7th Cir. March 29, 1978).

In *United States v. White, supra*, 488 F.2d at 662, the defendant fled from police attempting to arrest him for an incident that had occurred over five months previously. There was no evidence that at the time of the flight he knew he was being sought for the crime charged. We held in the context of that case that admission of the evidence of flight and the giving of a flight instruction was not appropriate because evidence of flight was not sufficiently reliable

<sup>8</sup> There was evidence that at the time of his arrest several months after the Oregon incident, Peltier was in fact aware that he was being sought for the murders of the two F.B.I. agents. One of the officers who arrested Peltier in Canada testified that Peltier acknowledged he knew he was wanted for the murders. Peltier also stated he would have resisted arrest by deadly force if he had known the police officers were nearby, saying: "I have got nothing to lose • • •."

as an indication of guilt. Within the framework of the *Myers* analysis, *United States v. Myers, supra*, 550 F.2d 1036, the evidence in *White* was simply too speculative to allow the jury to draw an inference of consciousness of guilt concerning the crime charged.

*White* does not require that where flight occurs a substantial time after the crime, evidence of that flight is properly admitted only if the government can prove with direct evidence that the defendant knows he is being sought for the crime charged. As the foregoing discussion indicates, there was sufficient circumstantial evidence that the defendant knew he was wanted for the murders of the F.B.I. agents.

Peltier also argues that, notwithstanding the relevance of the evidence, its probative value was substantially outweighed by the possibility of prejudice, and therefore it was inadmissible. We disagree. As we stated above, the evidence in this instance was highly probative. In the context of this case, the evidence did not prejudicially distort the general case against the defendant. As we related above, evidence pertaining to a great number of firearms and ammunition components was admitted as part of the government's case without objection by the defendant. The Pine Ridge shoot-out had many participants and there was no dispute as to the large number of firearms possessed by the AIM members. This additional firearms testimony could not have had nearly as strong an impact on the jury as in the cases cited by the defendant for the proposition that firearms evidence is highly prejudicial. See, e.g., *United States v. Robinson*, 560 F.2d 507, 513-14 (2d Cir. 1977) (en banc), cert. denied, 98 S. Ct. 1451 (1978); *United States v. Warledo*, 557 F.2d 721, 724-26 (10th Cir. 1977). Furthermore, the evidence was not presented in an inflammatory manner; in relation to the length of the trial, the time necessary for its presentation was brief. See *United States v. Maestas, supra*, 554 F.2d at 837 n.4. Finally, an elaborate cautionary instruc-

tion<sup>9</sup> was given, warning the jury against placing undue reliance on flight as evidence of guilt.

Finally, Peltier argues he offered to stipulate to his presence in Oregon and to the fact he was in flight, and that had the court accepted his offer to stipulate, other evidence of the Oregon incident would have been unnecessary. As a general rule, the government is not bound by the defendant's offer to stipulate. *United States v. Spletzer*, 535 F. 2d 950, 955 (5th Cir. 1976); *United States v. Caldwell*, 543 F.2d 1333, 1359 n.134 (D.C. Cir. 1974); *United States v. Brickey*, 426 F.2d 680, 686 (8th Cir.), *cert. denied*, 400 U.S. 828 (1970). As stated long ago by the court in *Parr v. United States*, 255 F.2d 86, 88 (5th Cir.), *cert. denied*, 358 U.S. 824 (1958):

The reason for the rule is to permit a party "to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight."

<sup>9</sup> The jury was instructed that:

The intentional flight or concealment of a defendant immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not of course sufficient in itself to establish his guilt; but is a fact which, if proved, may be considered by the jury in the light of all the other evidence in the case, in determining guilt or innocence. Whether or not evidence of flight or concealment shows a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

In your consideration of the evidence of flight or concealment you should consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to appear as a witness. Also, a sense of guilt does not necessarily reflect actual guilt.

As the court pointed out in *United States v. Spletzer*, *supra*, 535 F.2d at 955, however, this rule is subject to the provisions of FED. R. EVID. 403. The Advisory Committee in its notes accompanying Rule 403 suggested that:

In reaching a decision whether to exclude on grounds of unfair prejudice \* \* \* [t]he availability of other means of proof may also be an appropriate factor.

As the court pointed out in *United States v. Spletzer*, offers to stipulate in deciding whether to exclude or admit evidence under Rule 403. *Cf. United States v. Cook*, 538 F.2d 1000, 1005 (3d Cir. 1976). After careful analysis, however, we conclude that the district court did not abuse its discretion in refusing to exclude the government's evidence relating to the Oregon incident merely because of defendant's offer to stipulate. The defendant never indicated a willingness to stipulate to any of the details of his flight, but only to the flight itself. Such a stipulation, barren of any detail, would have robbed the government of most of the probative value of the admissible flight evidence as tending to show consciousness of guilt of the murders.

If, in fact, the evidence of the weapons found in the Oregon incident was inadmissible, in view of all of the other weapons introduced into evidence without objection, the addition of these weapons was, in our opinion, harmless error beyond a reasonable doubt.

#### b. Unrelated robbery of ranch house

The government introduced testimony that on or about November 14, 1975, a .30/30 rifle and a pickup truck were stolen from a residence near Ontario, Oregon. Peltier's fingerprints were found in the residence. When Peltier was apprehended in Canada, he had in his possession the .30/30 rifle stolen from Oregon.

The government argues that this testimony was relevant to prove Peltier was indeed the person who fled from the



motor home in Oregon and to show flight. Because Coler's revolver was found in the motor home, we agree evidence proving Peltier's presence there was relevant. We also agree that Peltier's actions of arming himself and stealing a vehicle for transportation were relevant to show continuing flight.

Peltier argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, especially in light of his willingness to admit his presence in Oregon. The other crimes evidence was not more highly probative of Peltier's presence in Oregon than his admission would have been, and the evidence of flight was essentially cumulative. Even if we held that the trial court abused its discretion in admitting this evidence, however, again we are convinced the error was harmless beyond a reasonable doubt. *United States v. Weir, supra*, 575 F.2d at 671. *See Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967); FED. R. EVID. 103 The evidence of Peltier's guilt was strong. The evidence in question was but a miniscule portion of the trial. Moreover, a cautionary instruction was given.<sup>10</sup>

#### B. WEAPONS EVIDENCE

The government, in addition to offering into evidence certain firearms that had been fired by various participants of the shoot-out at Pine Ridge, also introduced evidence relating to the circumstances surrounding the recovery of

<sup>10</sup> The jury was instructed that:

Evidence relating to the Oregon incidents and the defendant's alleged actions in connection with those incidents was also admitted for limited purposes. First, you may consider it insofar as you may find it relates to items of physical evidence that have been connected to the crime scene. Second, you may consider evidence of defendant's alleged actions in the Oregon incidents in determining whether he was in flight to avoid prosecution or for some other purpose.

those firearms. Included in the government's presentation was evidence of other firearms and explosive devices. Peltier vigorously disputes the admissibility of this evidence, and argues that its prejudicial impact on the jury mandates reversal of his conviction.

#### 1. Wichita, Kansas

As we stated above, the escape party fled to the Rosebud Reservation after the murders and remained there for a time before splitting up. Robideau, Charles, and Anderson then proceeded south, and the car in which they were riding exploded on the Kansas Turnpike. Police recovered a large number of weapons and explosives from the car, including the AR-15 linked to the crime scene and Special Agent Coler's rifle. Peltier was not an occupant of the car and was not in the vicinity. Admitted into evidence were three of the firearms recovered at the scene of the explosion, several pictures of the explosion-damaged vehicle, several pictures of the eight or more firearms recovered from the vehicle, and several pictures of shells and of hand grenades found at the scene. Testimony of the details of the police search of the area and the discovery of the items admitted was heard by the jury.

In his brief, Peltier does not clearly articulate the specific evidence relating to the Wichita incident to which he objects. At trial, he objected to the relevance of the pictures of the vehicle after the explosion. We hold that the district court properly found the pictures to be relevant to explain the condition of the weapons introduced into evidence at the trial. A crucial question was whether the .223 casing found in Coler's trunk was fired from the AR-15 found in Wichita. The ballistics expert testified that he was unable to fire the weapon because of its condition. He was, however, able to remove the bolt, place it on another AR-15, and conduct limited comparisons.

Defendant also objected to the pictures of the hand grenades on the grounds of relevance and prejudicial impact. The government argued that the hand grenades found at Wichita were relevant to link the occupants of the vehicle to certain firearms found at the scene of Pine Ridge. We agree with the trial court that the pictures were relevant, and that their probative value was not substantially outweighed by the danger of unfair prejudice to the defendant. Both sides stipulated that Peltier was not present at Wichita at the time of the explosion. We do not agree that this evidence caused the jury to speculate about other bad acts attributable to him, as the defense contends.

Peltier argues generally that the introduction of firearms evidence was highly prejudicial. However, as we stated earlier, Peltier does not make clear which of the Wichita evidence he claims was erroneously admitted. He did object at trial to Ex. 34-A, the AR-15 found in burned condition at Wichita, as irrelevant. We hold that the district court did not err in finding that Ex. 34-A was relevant. The government contended that it was the AR-15 carried by Peltier at Pine Ridge on the day of the murders and offered ballistics evidence linking it to the murders.

At the trial, Peltier did not object when the testimony and pictures of the eight or more firearms recovered from the vehicle were introduced by the government. Nor did he object when Ex. 30-A, Special Agent Coler's .308 rifle or Ex. 30-1, a firearm found in burned condition at Wichita, were offered. He stipulated to the admissibility of Ex. 30-AA, a .308 rifle, as a replica of Agent Coler's .308 rifle when it was in good condition.

Even if we construed Peltier's brief on appeal to raise an objection to all of this evidence relating to the Wichita incident, we would hold that the admission of the evidence was not plain error. The circumstances of the recovery of the AR-15 and Coler's rifle were relevant. The firearms

evidence could not be labeled highly inflammatory and prejudicial, in light of the wealth of firearms evidence admitted previously without objection. Moreover, Peltier was not present when the explosion and recovery of the firearms occurred.

Finally, Peltier offered to stipulate to the discovery of the AR-15 and Coler's rifle in Kansas. The government rejected the offer. As we hold above, the government generally is not bound by an offer to stipulate, and we are not convinced that this evidence requires a different rule.

## 2. *Rosebud*

On September 5, 1975, F.B.I. agents went to the Rosebud Indian Reservation, located about 180 miles east of the Pine Ridge Reservation, to arrest five persons charged with assault with a deadly weapon. While conducting a search incident to the arrest of several persons,<sup>11</sup> they recovered Special Agent Williams' .357 service revolver and several rifles linked ballistically to the case. Testimony revealed that the following items were found:

- a. seven firearms, several of which had obliterated serial numbers (the serial numbers on Special Agent Williams' service revolver and on Ex. 29-A, the M-1 .30 caliber Gerand rifle which Butler carried on the day of the murders were obliterated);
- b. a knapsack full of dynamite and hand grenades;
- c. a suitcase full of blasting caps;
- d. a bag containing spent rounds and live ammunition for various calibers;
- e. walkie-talkie radios.

Peltier again alleges that the evidence of unrelated firearms and other weapons was unduly prejudicial because

<sup>11</sup> One of those present at the Rosebud Reservation was Darrell Butler.

of its inherently inflammatory nature, arguing that its sole effect was to cause the jury to speculate about other bad acts of the defendant.

Again, no objection was made to the admissibility of any of this evidence. Much of it was clearly relevant and strongly probative. Special Agent Williams' revolver, six spent cartridges from Williams' revolver, six spent cartridges from Special Agent Coler's revolver, the M-1 rifle carried by Butler on the day of the murders, and the 44 Ruger carbine used by Joe Stuntz and carried out of Pine Ridge by Michael Anderson on the day of the murders were all seized at Rosebud.

The relevance of the remaining evidence is questionable. Assuming without deciding that it was erroneously admitted, we hold there was no plain error. No pictures or demonstrative evidence were admitted—only testimony, the purpose of which was to detail the discovery of the evidence directly related to the Pine Ridge episode. The parties agreed that Peltier was not present at Rosebud on the day the evidence was seized; the testimony revealed possession of weapons and explosive devices by *other persons*, and was not unfairly prejudicial to the defendant. *United States v. Graham*, 548 F.2d at 1313.

### 3. *Alberta, Canada*

On February 7, 1976, Peltier was arrested in Canada. The arresting officer testified that at the time of his arrest, Peltier had in his possession the .30/30 rifle stolen in Oregon, other property stolen from the Oregon ranch house, two pistols, and an M-1 semiautomatic rifle.

At the trial, Peltier made no objection to the admission of the two pistols or the .30/30 rifle found in his possession at the time of his arrest. Likewise, he did not object to the testimony regarding his possession of the property, including the .30/30 rifle stolen from the Oregon ranch house, or

his possession of an M-1 semiautomatic rifle. We hold that the admission of this evidence was not plain error.

### 4. *Not Prejudicial Error*

Ordinarily the admission into evidence of weapons, or pictures of weapons, which are not directly related to the crime, and to which proper objection is made, is prejudicial to the defendant and in many cases it has been held to be reversible error. *See United States v. Robinson*, *supra*, 560 F.2d at 513-16; *United States v. Warledo*, *supra*, 557 F.2d at 725, and cases cited therein. In this case, however almost all of the weapons, and some pictures which were not directly related to the crime, were admitted without objection. Some of these weapons and pictures of weapons were objected to by the defendant and as to these exhibits we hold the admission to be harmless error for these reasons: First, there were many weapons which were admitted without objection or were properly admitted as being found or used at the scene of the crime. The addition of the pictures and weapons which were not directly related to the crime and to which Peltier's counsel objected, could only be held to be cumulative and therefore not prejudicial.

Secondly, the direct and circumstantial evidence of Peltier's guilt was strong and, in our opinion, the admission of these additional exhibits did not prejudice the defendant's chances for acquittal.

## II

### F.B.I. Frame-up

The defense theory at the trial was that shortly after the murders, agents of the F.B.I. focused upon Peltier as a principal suspect, and thereafter conspired to manufacture evidence against him, resorting to threats, intimidation, and subornation in an effort to secure his conviction. On appeal,



Peltier contends that the district court ruled inadmissible the bulk of his proof of fabricated evidence and refused to charge the jury on the law applicable to the defense theory of the case, thereby depriving him of his right to compulsory process and to a fair trial.

#### A. REFUSAL TO GIVE DEFENSE INSTRUCTION

The instruction which the court refused to give, Defendant's Proposed Jury Instruction No. 19, read as follows:

Testimony has been adduced in this case which if believed by you shows that the Government induced witnesses to testify falsely. If you believe that the Government, or any of its agents, induced any witness to testify falsely in this case [or in any related case], this is affirmative evidence of the weakness of the Government's case.

Defendant contends the court erred in refusing to give this instruction, citing certain evidence admitted at trial allegedly proving the frame-up and several cases which stand for the proposition that the defendant in a criminal case is entitled to have presented to the jury instructions encompassing any theory of defense which is supported by law and which has some foundation in the evidence, however tenuous. See *United States v. Brown*, 540 F.2d 364, 380-81 (8th Cir. 1976); *United States v. Nance*, 502 F.2d 615, 619 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Vole*, 435 F.2d 774, 776-77 (7th Cir. 1970).

We reject defendant's contention that the trial court erred in refusing to give the proposed instruction. In the first place, proposed Instruction No. 19 does not incorporate what defendant contends was his theory of defense: that the government framed him by manufacturing evidence and inducing witnesses to testify falsely. The proposed instruction is essentially one relating to the credibility of witnesses, and was dealt with in the court's gen-

eral instructions 30, 38, and 45 on impeachment and credibility. The principle espoused in *Brown* and *Nance* was meant to apply to a more comprehensive defense instruction or series of defense instructions. As the court stated in *Laughlin v. United States*, 474, F.2d 444, 455 (D.C. Cir. (1972), *cert denied*, 412 U.S. 941, *reh. denied*, 414 U.S. 882 (1973), in refusing to apply the principle to the proposed instruction that the jury must acquit the defendant if it believed defense testimony denying guilt.

What is required before the theory of the case rule comes into play is a more involved theory involving "law" or fact, or both, that is not so obvious to any jury.

It is a matter of common sense that a government prosecution based on false testimony is a "weak" one.

In the second place, there is no evidentiary support for the instruction as written. Three critical government witnesses, Anderson, Draper, and Brown, who participated in the events of June 26 at Pine Ridge, did testify on cross-examination that F.B.I. agents threatened, intimidated, or physically abused them while questioning them in the initial stages of the investigation about their knowledge of the murders. Brown, in his testimony as a witness for the defense, also stated that he testified falsely before the grand jury as a result of fear of the F.B.I. All three witnesses testified that when they were interviewed, at early stages of the investigation, they answered the F.B.I.'s questions in a manner inconsistent with the truth for one reason or another. However, upon further questioning at the trial by the government attorney, they stated that the testimony they gave at the trial was the truth, as they best remembered it. Thus, their testimony provided no support for the proposed defense instruction that the government

induced them to *testify* falsely in this trial or in a related trial.<sup>12</sup>

Since the proposed instruction was essentially a credibility instruction already covered by the instructions given to the jury, and since there was no evidence that the government induced the witnesses to testify falsely at the trial, we perceive no error in the court's failure to give the proposed instruction.

*Failure to Give a More Comprehensive Theory of the Defense Instruction.*

The next issue is whether the trial court should have given a more comprehensive theory of the defense instruction. Peltier relies heavily on *United States v. Vole, supra*, 435 F.2d at 776, where the court found the failure to give the following instruction reversible error:

You are instructed that it is the defendant Vole's theory of this case that Charles Masini conspired with other persons to frame him for a counterfeiting conspiracy. If the facts adduced in support of the defendant Vole's theory create in your mind a reasonable doubt of his guilt of these charges, then you must find the defendant Vole not guilty of these charges.

Peltier, while attempting to prove his theory that he was the victim of an F.B.I. frame-up, did not request a similar instruction. We find the court's failure to give such an instruction was not plain error. Cf. *United States v. Hamilton*, 420 F.2d 1096, 1098-99 (7th Cir. 1970). We have concluded that the jury could not have been misled by the failure to receive a theory of defense instruction. The court's instructions clearly stated the government's

<sup>12</sup> Brown also stated that he lied to the grand jury. However, he affirmed, after his testimony regarding lying to the grand jury, that his testimony at trial was the truth.

burden of proof, the matter of credibility of witnesses was covered in great detail, and defense counsel vigorously asserted the theory of defense throughout the trial and in closing argument in an effort to discredit the government's case.

We note, furthermore, that Peltier's contentions of manufactured evidence are far from convincing. The district court allowed Peltier to present the following evidence relating to this theory of defense.

1. *Discovery of the .223 caliber casing.* The .223 caliber cartridge casing allegedly found in the trunk of Coler's car was critical evidence against Peltier. In an affidavit used in the Canadian extradition proceedings, F.B.I. Agent Cunningham stated that he had found the .223 cartridge casing in Coler's trunk. However, a 302 report<sup>13</sup> prepared by Cunningham on June 29, 1975, failed to document discovery of the casing. Cunningham later recanted that portion of his affidavit relating to his discovery of the cartridge.

Other evidence presented at the trial strongly contradicts Peltier's claim that the cartridge was not found in Coler's trunk. Winthrop Lodge, an F.B.I. fingerprint expert, testified that he found the .223 cartridge casing in the trunk of Coler's car on June 29, 1975, when he was examining the car for fingerprints. He produced his handwritten field notes, which documented his discovery. He further testified that the car had been searched and had been towed to a garage in Hot Springs, South Dakota. He turned the casing over to Cortlandt Cunningham, who began his examination of Coler's vehicle immediately after Lodge finished. The fact that Cunningham signed an affi-

<sup>13</sup> A 302 report is an F.B.I. form on which are transcribed notes or recollections of F.B.I. agents made in the course of their investigations.

davit that he had found the cartridge casing was merely a technical error.

2. *Sighting of Peltier and Eagle.* Special Agent Coward testified that late in the afternoon on the day of the murders,<sup>14</sup> he saw through the telescopic sight on his rifle two individuals, one of whom he identified as the defendant, at the scene of the crime. Coward also interviewed BIA Officer Stoldt, who was with him when he sighted the defendant. In his 302 report, which showed the date of the interview as June 28, 1975, Coward stated that Stoldt told of sighting two persons, one of whom looked like Jimmy Eagle, through his binoculars. Coward interviewed Stoldt again on September 4, 1975, and reported that Stoldt was now positive that he had seen Eagle and had also seen Peltier on June 26th. Stoldt was called as a defense witness, denied that he talked to Coward on June 28, and stated that he was uncertain on June 26 that one of the persons he sighted was Eagle.

Peltier contends that the discrepancy between Coward's and Stoldt's accounts was proof that Coward participated in the frame-up by falsely recording evidence. Again, however, the government offered an explanation for the apparent discrepancy. Stoldt testified that he talked to Coward only on June 26 and September 4, 1975, and not on June 28. Coward's testimony at trial was consistent with Stoldt's; he stated that he interviewed Stoldt and dictated his 302 report on June 26, and that the secretary simply made a typing error in dating the report June 28. Both witnesses at trial reaffirmed their sightings of Eagle and Peltier on June 26. In his second 302 of November 4, Coward wrote: "Stoldt stated that during the first statement he had given to the F.B.I. *a few days after the shooting* of the agents, he told the agents then \* \* \* that he saw Jimmy Eagle in the group that he had just identified.' "

<sup>14</sup> The agents were murdered at approximately 12:00 noon.

(Emphasis added.) Coward explained that when he wrote the second 302, he dated Stoldt's statement by referring back to the first 302 which showed his first interview as being on June 28. He also stated that on further reflection, he remembered that his first interview with Stoldt was on June 26.

3 *Association of .223 Cartridge Casing with AR-15.* An October, 1975, F.B.I. lab report contained a finding that the .223 cartridge casing received from the trunk of Coler's car could not be associated with any of the weapons which had been submitted to it for analysis. However, a February, 1976, F.B.I. report contained a finding that the .223 casing could be associated with the Wichita AR-15.

Peltier describes as "mysterious" the association of the .223 casing with the Wichita AR-15 four months after a report which concluded that no association could be found. However, the firearms expert, Evan Hodge testified that he first began to examine Ex. 34-B, the .223 cartridge casing, in December of 1975 or January of 1976. Defense counsel did not cross-examine him on the truth of this statement.

Because the instructions to the jury clearly set out the government's burden of proof, because the defense counsel stressed the theory of defense throughout the trial and in closing argument, and because of the nature of the defendant's proof of the alleged frame-up, we find no plain error in the court's failure to give a theory of the defense instruction.

#### B. DENIAL OF RIGHT TO COMPULSORY PROCESS

The trial court excluded certain evidence which Peltier contends was vital to his defense, stating that:

[T]he Court's position with reference to evidence to be offered by the defense is simply that evidence



relative to the issues and the evidence presented by the government will be admitted. I will state, however, that witnesses who have testified will not be impeached by a showing of misconduct of the Federal Bureau of Investigation *unless that misconduct relates to the testimony of the individual witnesses who have testified or unless that misconduct relates to exhibits that have been received in evidence.* (Emphasis added.)

The most significant evidence excluded was the testimony of Myrtle Poor Bear and Jimmy Eagle.

1. *Jimmy Eagle Episode.* Jimmy Eagle testified in an offer of proof that he was not on the Pine Ridge Reservation on June 26, 1975. He was later arrested on another charge, and F.B.I. agents who questioned him threatened to have him indicted for the murders if he did not cooperate in the investigation. He did not cooperate and was later indicted. As a result of the F.B.I. threats, his attorney warned him to remain silent at all times because the government would probably place informers in his cell.

After Eagle had been incarcerated for a time, the government obtained statements of four of his cellmates recounting Eagle's description to them of the events of June 26. Eagle testified in the offer of proof that he never made any of the statements attributed to him. Peltier contends the statements of the four cellmates were so thorough, and conformed so completely to the F.B.I.'s theory of the murders, that they impel the inference the F.B.I. concocted the statements and solicited the cooperation of four felons who desired favorable treatment.

2. *Myrtle Poor Bear Episode.* In February and March, 1976, Myrtle Poor Bear signed three affidavits which related her eyewitness account of the murders of the two agents on June 26, 1975. Two of these affidavits were considered by Canadian officials in the extradition proceedings. In testimony given outside of the presence of the jury at

the trial, Poor Bear disclaimed virtually every allegation contained in the affidavits. She testified that she had been forced to sign the affidavits, which were prepared by the F.B.I., under threats of physical harm.

The court excluded the proffered testimony under Rule 403 of the Federal Rules of Evidence. It found that the evidence was not material, and that any relevance it might have was outweighed by the danger of confusion of the issues and misleading the jury.

Peltier contends that the trial court, in excluding the Jimmy Eagle and Myrtle Poor Bear testimony, denied him his right to compulsory process. We disagree.

In *Washington v. Texas*, 398 U.S. 14, 23 (1967), the Supreme Court held that the sixth amendment right to compulsory process includes, in appropriate circumstances, the right to introduce relevant and material testimony from a witness qualified to testify under an appropriate standard of credibility. The Court reaffirmed the importance of allowing the defendant to present his defense in *United States v. Nixon*, 418 U.S. 683, 711 (1974), stating that:

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

However, the right of a defendant to introduce the testimony of witnesses in his behalf is not absolute. As the

Supreme Court noted in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973):

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E.g.*, *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

An analogous case is *United States v. Nobles*, 422 U.S. 225, 241 (1975), in which Justice Powell made this observation: "The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth."

Under the Federal Rules of Evidence, the trial court has broad discretion in determining the relevancy and admissibility of evidence. *United States v. Briscoe*, 574 F.2d 406, 408 (8th Cir. 1978); *United States v. Bad Cob*, 560 F.2d 877, 880 (8th Cir. 1977). It is only where the trial court excludes relevant evidence without sufficient justification that the defendant's constitutional right to compulsory process is violated. See *United States v. Melchor Moreno*, 536 F.2d 1042, 1045-46 (5th Cir. 1976). Exclusion of the evidence proffered by Peltier was justifiably excluded in this instance under the provision of FED. R. EVID. 403.

The evidence was only minimally relevant. Neither Jimmy Eagle nor Myrtle Poor Bear testified as a government witness against Peltier. Furthermore, Peltier made no showing that the integrity of the government's evidence against him was in any way tainted by the Myrtle Poor Bear and Jimmy Eagle episodes.

Peltier argues that the evidence was relevant to show bias on the part of government witnesses Anderson, Draper, and Brown. He argues that Poor Bear's and Eagle's testimony, if believed by the jury, might have caused the jury to speculate further as to whether the knowledge Anderson, Draper, and Brown testified to was implanted in their minds by coercive F.B.I. interrogation.

It is true that "[e]vidence tending to show a substantial reason for bias or interest in an important witness is never collateral or irrelevant. It may be \* \* \* the very key to an intelligent appraisal of the testimony of the [witnesses]." *Barnard v. United States*, 342 F.2d 309, 317 (9th Cir. 1965). See *Davis v. Alaska*, 415 U.S. 308, 316-17 (1974); *Johnson v. Brewer*, 521 F.2d 556, 561 (8th Cir. 1975). However, Eagle's and Poor Bear's allegations of F.B.I. harassment, even if true, shed very little, if any, light on the credibility of *other* witnesses, since the trial court allowed full inquiry into the dealings of Anderson, Draper, and Brown with the F.B.I. In light of the full presentation to the jury of F.B.I. actions which might have caused bias on the part of these three witnesses, the testimony of Poor Bear and Eagle would only have been cumulative.

Peltier also argues that the Poor Bear and Eagle testimony was admissible to show the intention of the F.B.I. to bring about his conviction, no matter what the cost. This issue is a more difficult one. As we stated earlier, Peltier's theory of the case was that the F.B.I. framed him by manufacturing evidence and inducing witnesses to testify in accordance with its theory of the murders. The Poor Bear and Eagle testimony was certainly consistent with that theory. However, we do not find an abuse of discretion on the part of the district court in excluding the evidence. The district court weighed the following factors:

- a. the defendant's failure to point to specific evidence used against him, the reliability of which was directly affected by the Poor Bear or Eagle episodes;

b. the lack of probative value of the proffered evidence.

i. *Myrtle Poor Bear*. It is apparent, from reading the trial transcript, that Myrtle Poor Bear was not a reliable witness. Her testimony was at all times very vague, and she often responded that she could not remember. Indeed, defense counsel, anticipating that she would be called as a witness for the government, described her in his opening statement as a "witness whose mental imbalance is so gross as to render her testimony unbelievable."

ii. *Jimmy Eagle*. In addition to offering Eagle's testimony, the defense also called two of the four cellmates who gave the allegedly controverted statements to the government. Both witnesses affirmed the truth of their earlier statements to the F.B.I., and denied that the F.B.I. induced them to make false statements.<sup>15</sup> There was thus no real proof that the F.B.I. solicited statements from the four cellmates. There was only proof that Eagle denied making the statements.

iii. The probability that the government would offer countervailing evidence, thus extending an already lengthy trial.

iv. The danger of unfair prejudice to the government. The proffered evidence would clearly have tended to divert the jury's attention from the issue before it—Peltier's guilt or innocence.

While the more prudent course might have been to allow the defense to present the evidence, we find no abuse of discretion in the trial court's exclusion of the testimony of

<sup>15</sup> The two witnesses testified outside the presence of the jury that after their testimony at trial, they had been threatened by Peltier himself that if they did not return to court and testify that their earlier testimony had been induced by F.B.I. threats, their lives would be in danger.

Jimmy Eagle and Myrtle Poor Bear, in light of its low probative value, the potential for further delay in the trial, and the danger of unfair prejudice to the government.

We now summarize briefly the remaining evidence excluded by the trial court which the defendant contends further supported his defense that he was the victim of an F.B.I. frame-up. We have concluded that the evidence was properly excluded and would not have bolstered the defense theory.

*Telescopic Sight Demonstration*. Coward and Stoldt testified that when they sighted Peltier and Eagle on the day of the murders, they were approximately one-half mile from them. The defendant requested that the members of the jury be permitted to look through Coward's telescopic sight to satisfy themselves that an identification could not be made from such a distance. The question of whether to permit jury experiments rests within the discretion of the trial court. *Friedman v. United States*, 347 F.2d 697, 709 (8th Cir.), *cert. denied*, 382 U.S. 946 (1965). We hold that the trial court's refusal to allow the jury members to look through the telescopic sight was not an abuse of discretion here. The trial court did permit the defendant to introduce the testimony of a firearms expert, who attempted to identify a familiar individual through the same telescopic sight at a distance of one-half mile and was unable to do so. The expert did *not* testify that such an identification was impossible. Furthermore, on cross-examination, the expert testified that a number of factors could influence a person's ability to make such a sighting, including atmospheric conditions, the eyesight of the observer, the lay of the land, and prior training with a scope. Since these variables would affect each juror's experience with sighting through Coward's sight, we agree with the district court that such an experiment would have little, if any, probative value.

*F.B.I. Lab Reports*. While the district court admitted into evidence the lab reports regarding the association or



lack of association between the .223 casing and the Wichita AR-15, the court refused to allow defense counsel to mention the dates of the reports in his argument to the jury, citing FED. R. EVID. 613(b). Defense counsel stated his firm agreement with the court's ruling. The court's reason for restricting counsel was that when the author of the reports, Evan Hodge, was on the stand, counsel for the defense declined to question him as to the reason for the apparent inconsistency, after the trial court suggested that he do so. We hold that the district court did not abuse its discretion in so limiting defense counsel's argument. On redirect, in response to a question from government counsel, Hodge stated that he first began to examine Ex. 34-B, the .223 cartridge casing, in December of 1975 or January of 1976. On recross, defense counsel did not question Hodge on the timing of his association of the Wichita AR-15 with the .223 casing, preferring to let the lab reports speak for themselves. The lab reports were before the jury, which could draw what inferences it chose.

*Waring 302.* Special Agent Waring's 302 was an eight-page report which apparently had been typed on two typewriters. The dates of dictation (June 26) and transcription (June 30) were transposed. The defendant contended that the report had been doctored at a later time to conform with the emerging theory of the case. The district court refused to admit the report, but allowed extensive testimony concerning the alleged difference in type.

Special Agent Waring testified that he had dictated one of his 302's to two different secretaries, who may have typed the 302 on two different typewriters. Defense counsel, on cross-examination, questioned Waring about the fact that the 302 was typed on two different typewriters and suggested that Waring had had the 302 retyped so as to conform to an agreed upon version of the facts. Waring denied the allegation. Defense counsel then sought to introduce the 302 into evidence to allow the jury to witness the

different types on the report. The defense later called a witness who testified that the 302 in question did indeed contain two different types. Even were we to hold that the trial court erred in excluding the report, we fail to see how the defendant was prejudiced by the trial court's ruling, in view of the fact that the question of the different types was examined in such detail in the testimony.

### III

#### REFUSAL TO READ TESTIMONY TO JURY

During its deliberation the jury made two requests that certain trial testimony be read: a portion of Michael Anderson's testimony, and the two statements made by Peltier after his comment at his arrest that, if he had known the persons approaching him were law enforcement officers, "he would blow [them] out of [their] shoes." The trial court refused the requests, instructing the jury instead to rely upon its recollection of the witnesses' testimony during trial.

The decision to read testimony as requested by the jury rests within the sound discretion of the trial judge. *United States v. Ballard*, 535 F.2d 400, 407 (8th Cir.), *cert. denied*, 429 U.S. 918 (1976); *United States v. Mesteth*, 528 F.2d 333, 334 (8th Cir. 1976). We have examined the requested testimony and are satisfied that the trial court did not abuse its discretion.<sup>16</sup> The testimony was not crucial to the

<sup>16</sup> Peltier also contends that the trial court failed to exercise any discretion at all, declaring "its rigid policy of traditionally denying jury requests for testimony." We have reviewed the transcript and are not persuaded that the trial court's comments may properly be construed as stating such a policy. We note, however, the holding of the United States Court of Appeals for the Seventh Circuit, that:

[W]e believe a judge could properly adopt and follow a routine practice of declining such requests unless supported by some extraordinary showing of need.

*United States v. McCoy*, 517 F.2d 41, 45 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975).

verdict, as the defendant contends, citing *United States v. Rabb*, 453 F.2d 1012, 1013-14 (3d Cir. 1971). Furthermore, the failure to read the testimony did not create unfairness to him, as he contends, citing *United States v. Jackson*, 257 F.2d 41 (3d Cir. 1958), since the requested testimony was favorable to the government's case.

#### IV

##### EXTRADITION

Peltier contends, for the first time on appeal, that the trial court had no jurisdiction to try him, because he was extradited from Canada in violation of the Webster-Ashburton Treaty, 8 Stat. 572.

Article X of the Webster-Ashburton Treaty provides in pertinent part that:

It is agreed that the United States and Her Britannic Majesty shall \* \* \* deliver up to justice all persons who, being charged with the crime of murder \* \* \* shall seek an asylum, or shall be found, within the territories of the other: *provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial* \* \* \*. (Emphasis added.)

8 Stat. 576. Peltier contends that the evidence of criminality presented to the Canadian tribunal "consisted of the false affidavits of Myrtle Poor Bear, obtained by the government through coercion and deceit and known by the government to be false." He contends that the presentation of false evidence violated the terms of the treaty, thereby depriving the trial court of jurisdiction. He cites a long line of cases beginning with *United States v. Rauscher*, 119 U.S. 407 (1886), which stand for the proposition that the demanding state may not charge and try the extradited defendant for a crime other than one enumerated in the applicable ex-

tradition treaty, and for which he was specifically extradited.

The government argues that the jurisdiction of the trial court over the defendant is not affected by the manner in which his presence before the court was obtained, citing *Frisbie v. Collins*, 342 U.S. 519 (1952) and *Ker v. Illinois*, 119 U.S. 436, 444 (1886). However, we do not find it necessary to decide what standard should be applied to the review of claims of government misconduct in international proceedings,<sup>17</sup> since, under any standard, Peltier's claim is, on its face, lacking in substance. Peltier does *not* claim that he was extradited solely on the basis of Myrtle Poor Bear's affidavits<sup>18</sup> or that the other evidence presented to the Canadian tribunal was insufficient to warrant extradition. It is clear from a review of the trial transcript that other substantial evidence of Peltier's involvement in the murders was presented in the extradition proceedings, but the record of those proceedings was not made available either to the trial court or to this court.

<sup>17</sup> We note that the United States Court of Appeals for the Second Circuit has recently declined to give such broad effect to *Frisbie* and *Ker*, holding in *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974) that:

[W]e view due process as now requiring a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights.

<sup>18</sup> The use of the affidavits of Myrtle Poor Bear in the extradition proceedings was, to say the least, a clear abuse of the investigative process by the F.B.I. This was conceded by government counsel on the hearing in this court. It does not, however, follow that the testimony of this obviously confused and "unbelievable" witness should have been permitted under either theory advanced by Peltier as hereinbefore set forth. See discussion, *supra*, at p. 38 of this opinion.

**COLLATERAL ESTOPPEL**

Peltier alleges that his prosecution was barred by the doctrine of collateral estoppel, since codefendants Robideau and Butler were found not guilty by a jury on the basis of evidence much of which was the same evidence adduced against Peltier. Peltier was not a party to that proceeding, and may not invoke the doctrine of collateral estoppel. *United States v. Brown*, 547 F.2d 438, 444 (8th Cir.), *cert. denied*, 430 U.S. 937 (1977). *Cf. Turley v. Wyrick*, 554 F.2d 840, 842 (8th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

The judgment of conviction is affirmed.

A true copy.

Attest:,

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

**APPENDIX B — AFFIDAVIT ONE**

UNITED STATES OF AMERICA  
STATE OF SOUTH DAKOTA  
COUNTY OF PENNINGTON

IN THE MATTER OF THE EXTRADITION ACT. R.S.C. 1970 CHAP.  
E-21 AND IN THE MATTER OF LEONARD PELTIER, ALSO  
KNOWN AS LEONARD LITTLE SHELL, LEONARD WILLIAMS,  
JOHN YELLOW ROBE, ERWIN YELLOW ROBE, LEONARD  
JOHN PELTIER

**Affidavit**

Myrtle Poor Bear, being first duly sworn, deposes and states:

1. I am an American Indian born February 20, 1952, and reside at Allen, South Dakota, one of the United States of America.

2. I first met Leonard Peltier in Bismarck, North Dakota, during 1971. During March, 1975, I again met Leonard Peltier at St. Francis, South Dakota, United States of America. During April, 1975, I went to North Dakota to see him as a girl friend of his. About the last week of May during 1975 I and Leonard Peltier went to the Jumping Bull Hall near Oglala, South Dakota, United States of America. There were several houses and about four or five tents. When Leonard Peltier arrived, he gave orders on what was to be done. I was his girl friend at this time. About a week after we arrived, about the second week of June, 1975, Leonard Peltier and several others began planning how to kill either Bureau of Indian Affairs Department, United States Government police or Federal Bureau of Investigation, United States Government, agents who might come into the area. Leonard Peltier was mostly in charge of the planning. All persons involved in the



planning had special assignments. There was also a detailed escape route planned over the hills near the Jumping Bull Hall area. I was present during this planning. Leonard Peltier always had a rifle and usually had a pistol near him. The pistol was usually under a car seat. About one day before the Special Agents of the Federal Bureau of Investigation were killed, Leonard Peltier said he knew the Federal Bureau of Investigation or the Bureau of Indian Affairs were coming to serve an arrest warrant on Jimmy Eagle. Leonard Peltier told people to get ready to kill them and he told me to get my car filled with gas to be ready for an escape. I left Jumping Bull Hall at this point and did not return. During August, 1975, I met Leonard Peltier again at Crow Dog's Paradise on the Rosebud Indian Reservation, South Dakota, United States of America. We talked about the killing of the two Federal Bureau of Investigation agents near Jumping Bull Hall. Leonard said it makes him sick when he thinks about it. He said that one of the agents surrendered, but he kept shooting. He said it was like a movie he was watching but it was real, he was acting right in it. He said he lost his mind and just started shooting. He said he shot them and just kept pulling the trigger and couldn't stop.

Subscribed and sworn to before me this 19th day of February, 1976.

/s/

Deputy Clerk  
United States District Court  
District of South Dakota

/s/

Myrtle Poor Bear

I, Andrew W. Bogue, United States District Judge for the District of South Dakota, do hereby certify that at-

tached hereto is the Affidavit of Myrtle Poor Bear, sworn to before Betty B. Berry, Deputy Clerk of the United States District Court for the District of South Dakota, whose signature appears on said Affidavit, and that the said Betty B. Berry, was authorized to administer oaths for general purposes and that the said Affidavit is in due form of law.

In testimony whereof I have hereunto signed my name and caused the seal of the said Court to be affixed at the City of Rapid City in the state of South Dakota, this \_\_\_\_\_ day of February, 1976.

ANDREW W. BOGUE

*United States District Judge*

#### APPENDIX B — AFFIDAVIT TWO

UNITED STATES OF AMERICA  
STATE OF SOUTH DAKOTA  
COUNTY OF PENNINGTON

IN THE MATTER OF THE EXTRADITION ACT. R.S.C. 1970 CHAP. E-21 AND IN THE MATTER OF LEONARD PELTIER, ALSO KNOWN AS LEONARD LITTLE SHELL, LEONARD WILLIAMS, JOHN YELLOW ROBE, ERWIN YELLOW ROBE, LEONARD JOHN PELTIER

#### **Affidavit**

Myrtle Poor Bear, being first duly sworn, deposes and states:

1. I am an American Indian born February 20, 1952, and reside at Allen, South Dakota, one of the United States of America.

2. I first met Leonard Peltier in Bismarek, North Dakota, during 1971. During March, 1975, I again met Leonard Peltier at St. Francis, South Dakota, United States of America. During April, 1975, I went to North Dakota to see him as a girl friend of his. About the last week of May during 1975 I and Leonard Peltier went to the Jumping Bull Hall near Oglala, South Dakota, United States of America. There were several houses and about four or five tents. When Leonard Peltier arrived, he gave orders on what was to be done. I was his girl friend at this time. About a week after we arrived, about the second week of June, 1975, Leonard Peltier and several others began planning how to kill either Bureau of Indian Affairs Department, United States Government police or Federal Bureau of Investigation, United States Government, agents who might come into the area. Leonard Peltier was mostly in charge of the planning. All persons involved in the planning had special assignments. There was also a detailed escape route planned over the hills near the Jumping Bull Hall area. I was present during this planning. Leonard Peltier always had a rifle and usually had a pistol near him. The pistol was usually under a car seat. About one day before the Special Agents of the Federal Bureau of Investigation were killed, Leonard Peltier said he knew the Federal Bureau of Investigation or the Bureau of Indian Affairs were coming to serve an arrest warrant on Jimmy Eagle. Leonard Peltier told people to get ready to kill them and he told me to get my car filled with gas to be ready for an escape, which I did. I was present the day the Special Agents of the Federal Bureau of Investigation were killed. I saw Leonard Peltier shoot the FBI agents. During August, 1975, I met Leonard Peltier again at Crow Dog's Paradise on the Rosebud Indian Reservation, South Dakota, United States of America. We talked about the killing of the two Federal Bureau of Investigation agents near Jumping Bull Hall. Leonard said it makes him sick

when he thinks about it. He said that one of the agents surrendered, but he kept shooting. He said it was like a movie he was watching but it was real, he was acting right in it. He said he lost his mind and just started shooting. He said he shot them and just kept pulling the trigger and couldn't stop.

Subscribed and sworn to before me this 23rd day of February, 1976.

/s/

Deputy Clerk  
United States District Court  
District of South Dakota

/s/

Myrtle Poor Bear

I, Andrew W. Bogue, United States District Judge for the District of South Dakota, do hereby certify that attached hereto is the Affidavit of Myrtle Poor Bear, sworn to before Betty B. Berry, Deputy Clerk of the United States District Court for the District of South Dakota, whose signature appears on said Affidavit, and that the said Betty B. Berry, was authorized to administer oaths for general purposes and that the said Affidavit is in due form of law.

In testimony whereof I have hereunto signed my name and caused the seal of the said Court to be affixed at the City of Rapid City in the state of South Dakota, this \_\_\_\_\_ day of February, 1976.

/s/

ANDREW W. BOGUE  
United States District Judge

**APPENDIX B — AFFIDAVIT THREE**

UNITED STATES OF AMERICA  
 STATE OF SOUTH DAKOTA  
 COUNTY OF PENNINGTON

IN THE MATTER OF THE EXTRADITION ACT. R.S.C. 1970 CHAP.  
 E-21 AND IN THE MATTER OF LEONARD PELTIER, ALSO  
 KNOWN AS LEONARD LITTLE SHELL, LEONARD WILLIAMS,  
 JOHN YELLOW ROBE, ERWIN YELLOW ROBE, LEONARD  
 JOHN PELTIER

**Affidavit**

Myrtle Poor Bear, being first duly sworn, deposes and states:

1. That I am the Myrtle Poor Bear, of Allen, South Dakota, United States of America, who was the deponent in an affidavit sworn the 23rd day of February, 1976. This affidavit is sworn by me to give further information.

2. Attached hereto and marked Exhibit "A" to this, my Affidavit, is a photograph marked February 12, 1976, and I testify and depose that the person shown on the said photograph is a person known to me as Leonard Peltier and is the person I spoke of in my deposition of February 23, 1976, and the person referred to herein as Leonard Peltier.

3. I recall the events of June 26, 1975, which occurred at the area of Jumping Bull Hall near Oglala on the Pine Ridge Indian Reservation in the State of South Dakota, United States of America.

4. Sometime during the early part of that day, at approximately 12:00 Noon, Leonard Peltier came into the residence of Harry Jumping Bull which is located in the area of Jumping Bull Hall and said, "They're coming."

I understood this to mean that police or agents of the Federal Bureau of Investigation were in the immediate area. A short time later, I saw a car which I recognized to be a government car near Harry Jumping Bull's house. I went down to the creek bottom a couple of hundred yards from the house. I heard shooting. I left the creek bottom area and walked approximately 50 yards to where I saw two cars, both of which I recognized to be government cars, because of the large radio antennae mounted on the rear of these cars and I had previously seen many cars of a similar type driven by government agents in the same area. When I got to the car, Leonard Peltier was facing a man which I believed to be a special agent of the Federal Bureau of Investigation. This man was tall with dark hair. This man threw a handgun to the side and said something to the effect that he was surrendering. Leonard Peltier was pointing a rifle in the direction of this man. The man was holding his arm as if he was wounded and was leaning against the car previously mentioned. There was another man who I believed to be a special agent of the Federal Bureau of Investigation lying face down on the ground and there was blood underneath him. I started to leave and was grabbed by the hair by another person and could not get away. I turned again and saw Leonard Peltier shoot the man who was standing against the car. I heard a shot come from the rifle that Leonard Peltier was holding and I saw that rifle jump up still in his hands. I saw that man's body jump into the air and fall to the ground. The man fell face down on the ground. This happened in an instant. I freed myself from the person that was holding me and ran up to Leonard Peltier just as he was aiming his rifle at the man who had just fallen to the ground. I pounded Leonard Peltier on the back. He yelled something at me which I cannot recall. I turned, ran and left the area. As I was running away, I heard several more shots from the area from which I had just fled.



48a

Subscribed and sworn to before me this 31st day of  
March, 1976.

/s/

Deputy Clerk  
United States District Court  
District of South Dakota

/s/

Myrtle Poor Bear

49a

**APPENDIX C**

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

No. 77-1487

LEONARD PELTIER, *Appellant*,

v.

UNITED STATES OF AMERICA, *Defendant*.

EXCERPTS FROM ARGUMENT  
FROM MAGNETIC TAPE

APRIL 12, 1978

JUDGE ROSS: Assuming that she [Myrtle Poor Bear] was incompetent, what about the affidavit that they used in the extradition proceeding?

MR. HULTMAN: All right, Your Honor. When the—— To go back in time frame, Your Honor, so that maybe I can better explain that, these affidavits were in the early part of the year, in January, February. I don't remember the exact dates, but the dates were on the affidavits themselves. And at that time that was all that was known by anybody concerning Myrtle Poor Bear. And I can stand before this court and say that that is the only thing that the prosecutor, because I was the representative for the Government, that was the only thing of which I had any knowledge of any kind. So the affidavits were accepted on their face as being statements of a witness who was present who was testifying in the affidavit under oath as to what she saw.

JUDGE ROSS: But anybody who read those affidavits would know that they contradict each other. And why the FBI and Prosecutor's office continued to extract more to

put into the affidavits in hope to get Mr. Peltier back to the United States is beyond my understanding.

MR. HULTMAN: Yes.

JUDGE ROSS: Because you should have known, and the FBI should have known that you were pressuring the woman to add to her statement.

MR. HULTMAN: Your Honor, I personally was not present at that stage. I read the affidavits after they had been submitted, so I want this court to know that.

JUDGE ROSS: The Government—

MR. HULTMAN: And I don't excuse, by my remark just now to Your Honor, I don't in any way excuse what the court has just indicated. Your Honor, I have trouble with that myself, and Your Honor that is the exact reason which I did read these affidavits and put together the fact that— And that gets to the second point, Judge Gibson and Judge Ross. It was clear to me her story didn't later check out with anything in the record by any other witness in any other way. So I concluded then, in addition to her incompetence, first, that secondly, there was no relevance of any kind. Absolutely not one scintilla of any evidence of any kind that had anything to do with this case. And it was then that I personally made the decision that this witness was no witness. First of all, because she was incompetent in the utter, utter, utter ultimate sense of incompetency as recognized by defense counsel on more than one occasion. And there was some more indicia here in the record where they likewise further did. But, secondly, as Judge Ross, you are indicating, and I take no issue at that, Your Honor, but when I then tested those statements once they came to me, and that was after they had gone to Canada, and I had a chance to look at them and tested them with all of the record, all of the witnesses, there was not one scintilla that showed Myrtle Poor Bear was there, knew anything, did

anything, et cetera. And so, it is for those two reasons that I believe the court, very realistically, and very fairly, and in the total interest of justice determined for the reasons that the court then gave, that Myrtle Poor Bear's testimony would go totally to a collateral matter, even if it were a collateral matter with some relevancy.

JUDGE ROSS: But can't you see, Mr. Hultman, what happened happened in such a way that it gives some credence to the claim of the—

MR. HULTMAN: I understand, yes, Your Honor.

JUDGE ROSS: —the Indian people that the United States is willing to resort to any tactic in order to bring somebody back to the United States from Canada.

MR. HULTMAN: Judge—

JUDGE ROSS: And if they are willing to do that, they must be willing to fabricate other evidence. And it's no wonder that they are unhappy and disbelieve the things that happened in our courts when things like this happen.

MR. HULTMAN: Judge Ross, I in no way do anything but agree with you totally.

JUDGE ROSS: And you try to explain how they get there is not legally relevant in the case, and they don't understand that.

MR. HULTMAN: I understand, Your Honor.

JUDGE ROSS: We have an obligation to them, not only to treat them fairly, but not give the appearance of manufacturing evidence by interrogating incompetent witnesses.

MR. HULTMAN: Your Honor, I agree wholeheartedly, and I certainly have no quarrel with that, and that is why I say, as I indicated, I ultimately made a decision that I made, and I made that decision personally. I think the trial, itself, Your Honor, and the record in its totality, as well as

its individuality will show the very posture that the court has now indicated. And as a legal matter, I think that that is correct. Although, I certainly accept what the court has just said in totality, and I agree with it one hundred percent, Your Honor.

Now, later on then, the counsel again indicated at Page 3455 at the record, that anyone who talked to her, and he was referring to Myrtle Poor Bear, for even a few minutes would immediately know that she was an unbelievable witness. Now, those are just, that's all from the defense's side of the house, Your Honor. That has nothing to do from the Government's side of the house. So I believe that the ruling was a proper, discretionary one on the court, and he would have opened up a Pandora's Box into things that had absolutely nothing to do with the ultimate issues at trial, because she knew nothing, absolutely nothing, without question, about what took place.

JUDGE ROSS: Was she there at the time?

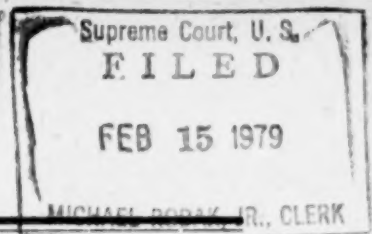
MR. HULTMAN: No, she was not. I don't think there is any question on the part of anybody, there is not one scintilla of evidence that indicates, finally, that she is there and has has anything to testify to the events.

JUDGE ROSS: All of this was in the affidavits?

MR. HULTMAN: Yes, that is correct, Your Honor.



No. 78-893



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**In the Supreme Court of the United States**  
OCTOBER TERM, 1978

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LEONARD PELTIER, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

---

WADE H. MCCREE, JR.  
*Solicitor General*

PHILIP B. HEYMANN  
*Assistant Attorney General*

MARSHALL TAMOR GOLDING  
*Attorney*  
*Department of Justice*  
*Washington, D.C. 20530*

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-893

LEONARD PELTIER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)  
is reported at 585 F.2d 314.

## JURISDICTION

The judgment of the court of appeals was entered  
on September 14, 1978. A petition for rehearing was  
denied on October 27, 1978. On November 17, 1978,  
Mr. Justice Blackmun extended the time for filing



a petition for a writ of certiorari to December 4, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### QUESTIONS PRESENTED

1. Whether the district court lacked jurisdiction over petitioner because his extradition from Canada was based, in part, upon false affidavits.

2. Whether, in the circumstances of this case, the district court abused its discretion in excluding testimony by the maker of the false affidavits that two FBI agents had coerced her into signing the affidavits.

3. Whether the district court properly refused to instruct the jury that it constituted affirmative evidence of the weakness of the government's case if the government or any of its agents induced any witness to testify falsely in this or any related case.

4. Whether the district court abused its discretion in admitting evidence of petitioner's connection with other crimes and other weapons.

#### STATEMENT

After a jury trial in the United States District Court for the District of North Dakota, petitioner was convicted of the first degree murder of two FBI agents on the Pine Ridge Indian Reservation in South Dakota, in violation of 18 U.S.C. 1111, 1114, and 2. He was sentenced to consecutive terms of life imprisonment. The court of appeals affirmed in a comprehensive opinion on which we largely rely (Pet. App. 1a-40a).

As thoroughly detailed in the opinion of the court of appeals (Pet. App. 1a-6a), the evidence at trial showed that FBI Agents Ronald Williams and Jack Coler met their deaths on June 26, 1975, while attempting to locate and arrest four individuals who were charged with armed robbery and assault with a deadly weapon. As part of that endeavor, the agents, in separate automobiles, followed a van into the Harry Jumping Bull Compound on the Pine Ridge Indian Reservation. After the van stopped at a fork in the road, its occupants emerged and began a gun battle with the agents, in which other residents on the reservation joined. The agents were badly wounded in the gun fight and were thereafter shot at point blank range and killed.

The following evidence linked petitioner to the murders: (1) petitioner had a motive to kill the agents, since he believed that they were on the reservation to arrest him on a state warrant charging him with attempted murder; (2) petitioner was an occupant of the van that the agents had followed onto the reservation; (3) petitioner was seen, just prior to the moment that the wounded agents were killed, standing by their automobiles with two other individuals, Robert Eugene Robideau and Darrell Dean Butler, holding what ballistic and other evidence identified as the murder weapon;<sup>1</sup> (4) on the evening after

<sup>1</sup> Robideau and Butler were also charged with the murders, as was James Theodore Eagle, one of the persons whom the agents had entered the reservation to apprehend. Robideau and Butler were tried jointly in the Northern District of Iowa,

the murders had occurred, petitioner was overheard discussing certain details of the murders with Robideau and Butler; (5) petitioner fled first the reservation, then South Dakota, and finally from the United States to Canada, resisting arrest with deadly force when he was stopped in Oregon in the course of his flight; and (6) at the time of petitioner's attempted arrest in Oregon, the revolver of one of the slain agents was found, in a bag bearing petitioner's thumbprint, in the vehicle in which he was riding.

#### ARGUMENT

1. Among the items submitted by the government to Canadian authorities in support of its successful extradition effort were two affidavits executed by Myrtle Poor Bear in which she alleged that she had seen petitioner commit the murders (see Pet. App. 43a-48a). Poor Bear had executed an earlier affidavit in which she alleged (as she did in the first of the two affidavits submitted to Canadian authorities) that petitioner had planned the killing of any law enforcement official who came on the reservation and thereafter admitted the murder of the two agents, but in which she also stated that she had left the reservation before the homicides occurred (see Pet. App. 41a-43a).<sup>2</sup> Petitioner contends (Pet.

while petitioner was a fugitive, and were acquitted. The charges against Eagle were dismissed on motion of the government.

<sup>2</sup> The earlier affidavit was produced by the government during the trial of Robideau and Butler pursuant to a discovery request and was submitted by petitioner to the Canadian Min-

9-12) that the submission of the Poor Bear affidavits in the extradition proceeding constituted a fraud that violated Article X of the Webster-Ashburton Treaty (8 Stat. 572, 576) governing extradition between this country and Canada<sup>3</sup> and that this "violation of the clear intent and meaning of an extradition treaty deprived the trial court of jurisdiction."<sup>4</sup>

We, of course, agree with the court of appeals (Pet. App. 39a n.18) that these flawed affidavits should not have been submitted to the Canadian authorities. But the fact that the affidavits were submitted provides no basis to second guess the decision of Canada to extradite petitioner or to hold that the district court was without jurisdiction to try him for the murders. The extradition order was the product of extended hearings before a Canadian court;

ister of Justice as newly discovered evidence in connection with his unsuccessful appeal from the extradition order (see Pet. 4-5). During oral argument of this case in the court of appeals, government counsel acknowledged that the affidavits were contradictory and that Poor Bear was "an unbelievable witness" (Pet. App. 49a-52a).

<sup>3</sup> Article X of the treaty provides in pertinent part:

It is agreed that the United States and Her Britannic Majesty shall \* \* \* deliver up to justice all persons who, being charged with the crime of murder \* \* \* shall seek an asylum, or shall be found, within the territories of the other: provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial \* \* \*.

<sup>4</sup> Petitioner raised this issue for the first time in his supplemental brief on appeal.

as the court below found, wholly apart from the Poor Bear affidavits, "other substantial evidence of Peltier's involvement in the murders was presented in the extradition proceedings" (Pet. App. 39a). Cf. *Franks v. Delaware*, No. 77-5176 (June 26, 1978), slip op. 8. Moreover, as petitioner acknowledges (Pet. 4-5), on his appeal from the extradition order he submitted the contradictory Poor Bear affidavit to the Canadian Minister of Justice as newly discovered evidence of the falsity of the two affidavits that had been before the extradition court, but the extradition order was nevertheless allowed to stand. In these circumstances, it is not the function of an American court to review the conclusion of the Canadian government that there was, as required by the treaty, sufficient "evidence of criminality \* \* \* according to the laws of" Canada to "justify [petitioner's] apprehension and commitment for trial."

*United States v. Rauscher*, 119 U.S. 407 (1886), and its progeny (see Pet. 11-12) do not aid petitioner's argument. *Rauscher* holds only that an extradited defendant is clothed by virtue of the extradition proceeding with the right, "both in regard to himself and in good faith to the country which had sent him here," to be tried only for the offense for which he was extradited. *Ker v. Illinois*, 119 U.S. 436, 443 (1886).<sup>5</sup> We have no quarrel with this

<sup>5</sup> *Ker*, which was decided the same day as *Rauscher*, stands for the relevant proposition that a court is not deprived of jurisdiction to try a defendant for a crime because of irregularities in bringing the defendant before the court. See

holding, which is merely an expression, as a rule of domestic law, of "[t]he 'principle of specialty,' long recognized in international law, [which] provides that 'the requisitioning state may not, without the permission of the asylum state, try or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited.'" *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973), quoting from Friedmann, Lissitzyn & Pugh, *International Law* 493 (1969). The latter principle is based in turn on the proposition that the trial of an extradited defendant for a crime other than that for which he was extradited "is not only a betrayal of the understanding of the surrendering nation but an action clearly contrary to the specific authorization of the treaty by

also *In re Johnson*, 167 U.S. 120, 126 (1897); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Contrary to petitioner's assertion (Pet. 11) and the assumption of the court of appeals (Pet. App. 39a n.17), *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), does not represent a disavowal by the Second Circuit of the *Ker-Frisbie* rule. As that court has subsequently explained, *Toscanino* did not hold that jurisdiction is impaired by irregularities—even including illegal abduction—in bringing a defendant before the court. To the contrary, in order for a defendant to be entitled to relief his presence must have been secured "through use of cruel and inhuman conduct amounting to a patent violation of due process principles" (*United States v. Lira*, 515 F.2d 68, 70 (2d Cir.), cert. denied, 423 U.S. 847 (1975); see also *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); *id.* at 69 (Anderson, J., concurring)) to which the state of refuge objects. See *United States ex rel. Lujan v. Gengler*, *supra*, 510 F.2d at 68.



the receiving nation." *Autry v. Wiley*, 440 F.2d 799, 801 (1st Cir.), cert. denied, 404 U.S. 886 (1971).

The rule of *Rauscher* was satisfied here, since petitioner was tried for the precise crimes for which he was extradited. By the same token, the court of appeals correctly rejected petitioner's claim that, because of the submission of the Poor Bear affidavits, his extradition was procured by a "betrayal of the understanding of" and a lack of "good faith to" Canada, which would not have extradited him had the falsity of the affidavits been known. As mentioned above, the Canadian Minister of Justice had evidence of the falsity of the Poor Bear affidavits before him when he upheld the extradition order on appeal.

2. Petitioner argues (Pet. 12-15) that the district court erred by excluding Poor Bear's testimony that FBI Agents William Wood and David Price had threatened, coerced, and intimidated her into signing false affidavits for use in the extradition proceedings.

a. The district court, after hearing the proffered testimony out of the presence of the jury (see XX Tr. 4409-4436), excluded it on the grounds that the testimony was irrelevant and that as a matter of law Poor Bear "was not a believable witness" (XXI Tr. 4665). The admission of her testimony, the court found, "would be confusing the issues, may mislead the jury and could be highly prejudicial" (XXI Tr. 4657-4658). The ruling that Poor Bear lacked credibility was based on the court's observation that she "was under obvious great mental stress" and had

suffered "a complete lapse of memory on cross-examination relating to recent events" (XXI Tr. 4657). The court also noted that she had been described by petitioner in his opening statement (in anticipation that she might be called by the government) as a "witness whose mental imbalance is so gross as to render her testimony unbelievable" (XXI Tr. 4655-4656; see also I Tr. 47); it stated its concern that "much of her mental imbalance may arise from fear," which it implied may have been caused by threats from petitioner or his colleagues (XXI Tr. 4659). Although the court acknowledged that her credibility might nevertheless be a question for the jury if her testimony were "otherwise relevant," it ruled that "under the Rules of Evidence" it was not otherwise relevant (XXI Tr. 4659) because neither Poor Bear nor Agents Wood and Price had been government trial witnesses (XXI Tr. 4657), and hence the proffered testimony was "related to a collateral matter" (XXI Tr. 4665).

The court of appeals correctly concluded that, "in light of its low probative value, the potential for further delay in the trial, and the danger of unfair prejudice to the government," the exclusion of the Poor Bear testimony was not an abuse of the trial judge's broad discretion under Rule 403, Fed. R. Evid. (Pet. App. 34a-35a; see also *id.* at 32a). In reaching this conclusion, the court below first observed that the proffered testimony "was only minimally relevant," since Poor Bear had not been a prosecution witness and petitioner had "made no show-

ing that the integrity of the government's evidence against him was in any way tainted" by the agents' alleged intimidation of her (*id.* at 32a). Next, the court agreed that Poor Bear's voir dire testimony and petitioner's own description of her in his opening statement showed that she was "not a reliable witness" (*id.* at 34a). Finally, the court noted the probability that the admission of her testimony would have evoked countervailing evidence from the government, "thus extending an already lengthy trial," and would "clearly have tended to divert the jury's attention from the issue before it—[petitioner's] guilt or innocence" (*ibid.*).

b. Petitioner contests the finding by both courts below that the proffered Poor Bear testimony was irrelevant, asserting two grounds for relevance. First, he claims that her testimony would have shown "the bias and hostility of two government witnesses, Woods and Price" (Pet. 6); such evidence, he argues, is always admissible "to contradict a witness' testimony or prove incredibility" (Pet. 13). The short answer to this contention is that the agents did not testify as government witnesses or even testify before the jury; their only appearance was as witnesses called by petitioner himself to testify outside the presence of the jury in support of his effort to introduce the Poor Bear testimony and similar testimony by Eagle.<sup>6</sup>

<sup>6</sup> Petitioner advanced a totally different argument in the court of appeals, contending that the Poor Bear testimony might have caused the jury to speculate whether the trial testimony of government witnesses Michael Anderson, Wilford

Second, petitioner argues more broadly that the Poor Bear testimony should have been admitted as evidence of "government consciousness of a weak cause" (Pet. 6, 12). Invoking the proposition that proof that a defendant attempted the spoliation of evidence is admissible to show consciousness of guilt (Pet. 15-16), he argues that on a like basis he should have been allowed to show through the Poor Bear testimony "the government's knowledge of the merits of the entire case" (Pet. 12). The two showings, however, are not comparable. A defendant has direct and personal knowledge of his culpability; an attempt at spoliation of evidence, therefore, like flight, is conduct on his part that may be interpreted as a confession of guilt. The government, however, cannot "confess" a defendant's innocence, since neither it nor its agents has personal knowledge on the sub-

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Draper, and Norman Brown was the result of coercive FBI interrogation and hence of dubious reliability (see Pet. App. 33a)—a proposition finding some support in *United States v. Haggett*, 438 F.2d 396, 399 (2d Cir.), cert. denied, 402 U.S. 946 (1971), a case cited by petitioner (Pet. 13). *Haggett*, however, has been limited by the Second Circuit to cases in which there has been "almost complete preclusion of cross-examination as to a witness' motive for testifying." *United States v. Blackwood*, 456 F.2d 526, 530, cert. denied, 409 U.S. 863 (1972); *United States v. Pacelli*, 521 F.2d 135, 139 n.1 (1975), cert. denied, 424 U.S. 911 (1976). Here, as the court of appeals pointed out in rejecting petitioner's argument (Pet. App. 33a), the district court allowed full inquiry into the FBI's dealings with the three witnesses (see V Tr. 839-848, 854-855, 859-860, 886, 888, 898, 900-901; VI Tr. 1082-1088, 1095, 1100, 1106, 1114-1116; XXII Tr. 4700-4843). Hence, Poor Bear's testimony concerning her dealings with the FBI would have been entirely collateral.

ject. An attempt by a government agent to suppress or alter evidence, should it occur, can show no more than prosecutorial doubts concerning the probative value of the rest of the government's evidence. But these doubts are not "knowledge"; they are opinion or evaluation. A prosecutor's or investigator's evaluation of the strength of his case is not relevant proof of the defendant's guilt or innocence. In short, what petitioner characterizes as the government's "knowledge of the merits of the entire case" is simply not a relevant issue concerning which the jury should have been permitted to hear evidence.

3. In a related claim, petitioner contends (Pet. 16-17) that the district court erred in refusing to instruct the jury that it was "affirmative evidence of the weakness of the government's case" if the government or any of its agents induced any witness to testify falsely in this "or in any related case" (see Pet. 5-6). This contention also was properly rejected by the court of appeals (Pet. App. 24a-25a). As it correctly pointed out, the proposed instruction did not present petitioner's "theory of the case" but rather related to the credibility of witnesses, a subject that was adequately covered by the trial judge's general instructions on impeachment and credibility (see instruction Nos. 28-31, 38, 45). A "theory of the case" is a "possible explanation for the events" explored at trial, such as that the defendant was framed by planted evidence. See *United States v. Vole*, 435 F.2d 774, 777 (7th Cir. 1970). A conclusion that the government's case is weak is not an "explanation for the events" but merely an evalua-

tion of the probative force of the government's evidence.<sup>7</sup> In any event, as the court below noted (Pet. App. 25a-26a), there was no evidentiary support for the proposed instruction, since while certain government witnesses testified that they had been threatened, intimidated, or physically abused when questioned by FBI agents during the preliminary stages of the murder investigation, none of the witnesses testified that he had been pressured in any way to give false testimony at trial, and they all affirmed that their trial testimony was truthful.<sup>8</sup>

4. Petitioner's claim (Pet. 17-22) that he was prejudiced by the improper admission of evidence of other crimes and other weapons was subjected to particularly close and exhaustive scrutiny by the

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<sup>7</sup> Contrary to petitioner's assertion (Pet. 17), *Vole* did not hold that a trial judge must give a "weakness of the case" instruction on request. The only holding in *Vole* concerning that instruction was that the instruction was inadequate to remedy the failure to give another requested instruction because it did not reflect the defendant's theory of the case. See 435 F.2d at 778.

<sup>8</sup> One witness did testify that, while his trial testimony was truthful (XXII Tr. 4819-4820), he had given false testimony before the grand jury (XXII Tr. 4808-4812). But a precondition to the giving of a "theory of the case" instruction is that it have legal as well as evidentiary support. *United States v. Vole*, *supra*, 435 F.2d at 776; *United States v. Cullen*, 454 F.2d 386, 390 (7th Cir. 1971). Petitioner has shown no such evidentiary or legal support for the proposition that an instruction bringing into issue the probative force of the government's case at trial based upon truthful testimony is justified because of the nature of the testimony presented during earlier stages of the case in another forum.



court below (Pet. App. 8a-23a). There is no reason to disturb its careful conclusions.

a. The evidence that petitioner was wanted on a state attempted murder charge was plainly relevant, as the court of appeals held (Pet. App. 10a), to establish the motive for his murder of the agents. Fed. R. Evid. 404(b).<sup>9</sup> Moreover, the district court made every effort to minimize the possibility of unfair prejudice to petitioner—for example, the existence of the outstanding charge was proven by stipulation rather than through testimony, the stipulation omitted the fact that the alleged victim was an off-duty police officer, and the court instructed the jury that petitioner was presumed to be innocent of the attempted murder charge and that evidence concerning the charge was to be considered only on the issue of motive and not in respect to petitioner's character (see Pet. App. 10a-11a).

b. The evidence concerning petitioner's resisting arrest in Oregon by the use of deadly force and subsequent theft of a rifle and pick-up truck from a nearby residence was admissible to show proof of flight, which in turn was relevant to show his consciousness of guilt (see Pet. App. 11a-18a). As the court of appeals noted (*id.* at 13a), petitioner fled

<sup>9</sup> The government offered testimony at trial that, upon his apprehension in Canada, petitioner stated that the two agents had been killed when they came to arrest him on the state warrant (XVI Tr. 3405-3408). Unless the prosecution had been permitted to introduce evidence that there was, in fact, a state warrant outstanding for him, petitioner could have attacked the veracity of that testimony.

the Pine Ridge Indian Reservation immediately after the murders and remained a fugitive until he was arrested in Canada seven months later; the Oregon incidents were a continuation of that immediate flight. The two vehicles in which petitioner and his companions were proceeding at the time of the attempted arrest were traveling arsenals linked by communications devices and codes manifestly designed to avoid arrest (*id.* at 13a-14a); more important, one of the vehicles contained evidence (Agent Coler's revolver) directly linking petitioner to the murders. In addition, petitioner's theft of a vehicle and a firearm immediately after being separated from his means of transportation and his arsenal (other than the sidearm he used to effectuate his escape) was relevant to show the continuing flight.<sup>10</sup> In short, as the court below correctly held (*id.* at 13a), the test enunciated in *United States v. Myers*, 550 F.2d 1036, 1049 (5th Cir. 1977), for determining the probative value of flight as circumstantial evidence of guilt was fully met in this case.<sup>11</sup> Here,

<sup>10</sup> Petitioner's connection with the theft of the vehicle and firearm was shown both by his fingerprints (which were found at the site of the theft) and his possession of the firearm when he was thereafter arrested in Canada (see Pet. App. 17a).

<sup>11</sup> Contrary to petitioner's assertion, there is no conflict among the circuits concerning whether evidence of other crimes may be used to show flight. The Fifth Circuit did hold in *Myers* that the introduction of other crime evidence is limited to "a purpose sanctioned by Rule 404(b) of the Federal Rules of Evidence" (see 550 F.2d at 1044), and flight is not one of the purposes listed in the Rule. In a subsequent en banc opinion, however, that circuit reversed its prior position and held that the sole test for the admission of other

there were undeniably "deliberately furtive actions and flight at the approach of \* \* \* law officers," which "are strong indicia of *mens rea* \* \* \*." *Sibron v. New York*, 392 U.S. 40, 66 (1968).<sup>12</sup>

c. Finally, the court of appeals properly rejected petitioner's claim that he was prejudiced by the admission of other weapons evidence (Pet. App. 15a, 18a-23a). The weapons fall into four categories (see Pet. 8-9): (1) those seized from the two vehicles in which he and his companions were traveling when the attempt was made to arrest him in Oregon; (2) those (including the rifle he stole in Oregon) seized when he was arrested in Canada; (3) those (including the murder weapon and a rifle belonging to one of the slain agents; see Pet. App. 19a) recovered by police after a vehicle in which co-defendant Robideau and two others were riding exploded on the Kansas Turnpike; and (4) those (including the service revolver of one of the slain agents, spent cartridges

crime evidence is that it be "relevant to an issue other than the defendant's character," that it "possess probative value that is not substantially outweighed by its undue prejudice," and that it "meet the other requirements of Rule 403." *United States v. Beechum*, 582 F.2d 898, 911 (1978), petition for cert. pending, No. 78-5774. There is, moreover, no merit to petitioner's argument (Pet. 20) that the probative value of flight as an indication of consciousness of guilt is weakened when the flight is shown by other crime evidence. Manifestly, a fugitive who resists arrest by the use of deadly force and undertakes theft to procure the means to continue his escape and a weapon to avoid future apprehension displays a greater consciousness of guilt than does one who merely runs away.

<sup>12</sup> In any event, even if the trial judge abused his discretion in admitting evidence of the Oregon incidents, the error was harmless beyond a reasonable doubt (Pet. App. 17a).

from the agents' firearms and two firearms used against the agents in the gun fight; see *id.* at 21a-22a) seized after a search incident to an unrelated arrest on the Rosebud Indian Reservation in South Dakota.<sup>13</sup>

The weapons in the first two categories were clearly relevant to petitioner's armed flight and the inference of consciousness of guilt to be drawn therefrom. Moreover, as the court below explained (Pet. App. 19a-20a), the introduction of weapons or pictures of weapons recovered from petitioner's confederates' car in Kansas (other than the murder weapon and the agent's rifle, which were plainly admissible) was necessary as part of the ballistic proof linking the murder weapon to the murders<sup>14</sup> and as

<sup>13</sup> The evidence showed that petitioner and other participants in the gun fight fled immediately to the Rosebud Reservation, where they remained for some time before splitting up. Robideau and his two companions left the Rosebud Reservation in the vehicle that later exploded on the Kansas Turnpike (see Pet. App. 5a-6a). The explosion occurred on September 10 and the Rosebud search occurred on September 5, 1975, a little more than two months after the murders. It was stipulated that petitioner was not present at either the explosion or the Rosebud search (see *id.* at 20a, 22a).

<sup>14</sup> Because the murder weapon was damaged in the explosion, the ballistics expert had to remove the bolt and place it in another rifle of the same make in order to conduct a test firing linking the weapon to a cartridge casing found in the automobile trunk of one of the agents (see Pet. App. 6a, 19a). It was necessary to introduce the other explosion-damaged weapons in order to show the effect of the explosion on all of the firearms contained in the vehicle and thereby to dispel any inference that a fraudulent test firing had been undertaken to link the rifle to the murders.

evidence linking the occupants of the vehicle to firearms found at the murder scene. Finally, those weapons and cartridges seized at the Rosebud Reservation that were linked to the gun fight were "clearly relevant and strongly probative" (*id.* at 22a).<sup>15</sup> Only testimony, not physical exhibits or photographs, was introduced concerning the remaining items seized at the reservation, and the testimony was introduced solely for the purpose of detailing the discovery of the evidence directly related to the gun fight. Hence, as the court of appeals correctly held (*id.* at 23a), most of the weapons evidence was unquestionably admissible and any error in the admission of the remainder was essentially cumulative and thus harmless beyond a reasonable doubt.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

<sup>15</sup> One of the persons arrested at the Rosebud Reservation at the time of the search was Butler, petitioner's confederate.